95-478

Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

COMPAGNIE DE REASSURANCE D'ILE DE FRANCE, ET AL.,

Petitioners,

v.

NEW ENGLAND REINSURANCE CORPORATION, ET AL.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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QUESTIONS PRESENTED

1. Whether, as a matter of law, section 1962(a) of RICO requires the plaintiffs to prove a special "investment" injury.

2. Whether, as a matter of law, section 1962(b) of RICO requires the plaintiffs to prove a special "acquisition" injury.

LIST OF PARTIES

PETITIONERS

A.A. Cassidy & Others
B.P.D. Kellet & Others
C.J. Warrilow & Others
Compagnie de Reassurance d'Ile de France
Group Josi Reinsurance Company S.A.
Hanseatica Ruckversicherungs Aktiengesellschaft
Imperio Reinsurance Company (U.K.) Limited
Uni-Polaris Forsikringsaksjelskap
Sampo International Insurance Company Limited
Societa Assicuratrice Industriale SPA
Terra Nova Insurance Company Limited
Atlantica Insurance Company Limited
The General of Berne Insurance Company
Otso Loss of Profits Insurance Company Limited
Samvirke Skadeforsikring A/S
Transatlantica Reinsurance Company N.V.
RVS Schadeverzekering N.V.
Enterprise-Fennia Mutual Insurance Company
Finnish Marine Insurance Company Limited
WASA International Insurance Company Limited
English & American Insurance Company Limited
City International Insurance Company Limited
Fuji International Insurance Company Limited
Lombard Continental PLC
Nippon Insurance Company of Europe Limited
Pohjola Insurance Company (U.K.) Limited
Kemper Reinsurance London Limited
Industrial Mutual Insurance Company
Pohjola Insurance Company

Kansa General International Insurance Company Limited and Tapiola International Insurance Company Limited.

RESPONDENTS

New Reinsurance Corporation
First State Insurance Company
and Cameron & Colby Co., Inc.

Those corporate Petitioners required to make a statement pursuant to Supreme Court Rule 29.1 state as follows:

Sampo International Insurance Company Limited

Following mergers and acquisitions which were completed early in 1994, Sampo International Insurance Company Limited, Industrial Mutual Insurance Company, Otso Loss of Profits Insurance Company Limited and Finnish and Marine Insurance Company became affiliates and are all now part of a group whose holding company is Sampo Insurance Company Limited. By the acquisition of Industrial Mutual Insurance Company, the group now owns 30% of The Home Insurance Company of New York.

Industrial Mutual Insurance Company

See statement of Sampo International Insurance Company Limited, above.

Otso Loss of Profits Insurance Company Limited

See statement of Sampo International Insurance

Company Limited, above. Until November 30, 1993, 25% of Otso Loss of Profits was owned by Pohjola Insurance Company, whose shares have been traded on the London, Helsinki and United States stock exchanges.

Finnish Marine Insurance Company

See statement of Sampo International Insurance Company Limited, above.

Terra Nova Insurance Company Limited

Terra Nova Insurance Company Limited has the following affiliates:

Aetna Life & Casualty Company
CIGNA Corporation
Marsh & McLennan Companies
Nimrod Securities
Orbis Pension Trustees Limited

Lombard Continental Insurance PLC

Lombard is owned by The Continental Corporation, which is now part of the CNA Insurance Companies.

Kemper Reinsurance London Limited

Kemper Reinsurance London Limited is a subsidiary of Kemper Reinsurance Company, which is owned by Lumberman's Mutual Casualty Company.

City Insurance Company

City Insurance Company is a subsidiary of The Home Insurance Company of New York. See statement of Sampo International Insurance Company Limited, above.

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COMPAGNIE DE REASSURANCE D'ILE DE, FRANCE, ET AL,

Petitioners,

v.

NEW ENGLAND REASSURANCE CORPORATION, ET AL.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

The Petitioners in this action[1] ("Petitioners" or "Reinsurers") respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the First Circuit, entered June 19, 1995, on Appeal No. 93-2338.[2]

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[1] A.A. Cassidy & Others, B.P.D. Kellet & Others, and C.J. Warrilow & Others, Compagnie de Reassurance d'Ile de France, Group Josi Reinsurance Company S.A., Hanseatica Ruckversicherungs Aktiengesellschaft, Imperio Reinsurance Company (U.K.) Limited, Uni-Polaris Forsikringsaksjelskap, Sampo International Insurance Company Limited, Societa Assicuratrice Industriale SPA, Terra Nova Insurance Company Limited, Atlantica Insurance Company Limited, The General of Berne Insurance Company, Otso Loss of Profits Insurance Company Limited, Samvirke Skadeforsikring A/S, Transatlantica Reinsurance Company N.V., RVS Schadeverzekering N.V., Enterprise-Fennia Mutual Insurance Company, Finnish Marine Insurance Company Limited, WASA International Insurance Company Limited, English & American Insurance Company Limited, City International Insurance Company Limited, Fuji International Insurance Company Limited, Lombard Continental PLC, Nippon Insurance Company of Europe Limited, Pohjola Insurance Company (U.K.) Limited, Kemper Reinsurance London Limited, Industrial Mutual Insurance Company, Pohjola Insurance Company, Kansa General International Insurance Company Limited, and Tapiola International Insurance Company Limited.

[2] Appeal No. 93-2338 is a cross-appeal. The main appeal in this action is Appeal No. 93-2339. The

OPINIONS BELOW

The opinion of the Court of Appeals for the First Circuit is reported at 57 F.3d 56, and is reprinted in the appendix hereto, at App. A 46 (hereinafter references to the appendix will be to "App. A___"). The Order of the Court of Appeals with respect to Appeal No. 93-2338 is reprinted in the appendix at App. A 176.

The opinion of the United States District Court for the District of Massachusetts (Harrington, J.) has been reported at 825 F. Supp. 370, and is reprinted in the appendix at App. A 1. The [Amended] Judgment in a Civil Case of the District Court of September 21, 1993, is reprinted in the appendix at App. A 40.

JURISDICTION

The district court had subject matter jurisdiction under 18 U.S.C. § 1964 (1944), based on the petitioners' claim that the respondents violated the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961-1968 (1994), and principles of pendent jurisdiction. It entered judgment for the petitioners on their state law claims on June 30, 1993, and an amended

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petitioners do not seek issuance of a writ of certiorari with respect to the decision of the Court of Appeals on Appeal No. 93-2339 at this time.

judgment for the petitioners on September 21, 1993. The district court did not enter an order dismissing the RICO claims, but ruled that petitioners could not state a cause of action under the statute. App. A 38 n.9; App. A 141 n.34.

Respondents filed a notice of appeal on October 19, 1993. Petitioners filed their notice of cross-appeal on November 2, 1993. On June 19, 1995, the Court of Appeals issued its opinion and orders with respect to both appeals.[3] The orders with respect to Appeal No. 93-2338 affirmed the district court's implicit dismissal of the petitioners' RICO claims. App. A 167. The order with respect to Appeal No. 93-2339 affirmed in part and reversed in part the district court's opinion, vacated the judgment, and remanded the state law claims for further proceedings. App. A 165. The position for a writ of certiorari has been filed within 90 days of June 19, 1995. This Court has jurisdiction to review the judgment of the Court of Appeals pursuant to 28 U.S.C. § 1254(1) (1988).

STATUTES INVOLVED

18 U.S.C. § 1961 (1994). Definitions.

As used in this chapter -

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[3] On July 5, 1995, Petitioners filed a Motion for Rehearing with respect to Appeal No. 93-2339 only. The Court of Appeals denied the Motion for Rehearing but amended its opinion in certain respects on July 12, 1995. App. A 173.

(1) "racketeering activity" means (A) any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code; Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891-894 (relating to extortionate credit transactions), section 1029 (relating to fraud and related activity in connection with access devices), section 1084 (relating to transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), section 1344 (relating to financial institution fraud), sections 1461-1465 (relating to obscene matter), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1513 (relating to retaliating against a witness, victim, or an informant), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate

transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), section 1956 (relating to the laundering of monetary instruments), section 1957 (relating to engaging in monetary transactions in property derived from specified unlawful activity), section 1958 (relating to use of interstate commerce facilities in the commission of murder-for-hire), sections 2312 and 2313 (relating to interstate transportation of stolen motor vehicles), sections 2314 and 2315 (relating to interstate transportation of stolen property), section 2321 (relating to trafficking in certain motor vehicles or motor vehicle parts), section 2341-2346 (relating to trafficking in contraband cigarettes), sections 2421-24 (relating to white slave traffic), (C) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds), (D) any offense involving fraud connected with a case under title 11, fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States, or (E) any act which is indictable under the Currency and Foreign Transactions Reporting Act; ***

(3) "person" includes any individual or entity capable of holding a legal or beneficial interest in property;

(4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity[.] ***

18 U.S.C. § 1962 (1994). Prohibited activities.

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of

the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt [.]
***

18 U.S.C. § 1964. Civil remedies.

(a) The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or

investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.

(b) The Attorney General may institute proceedings under this section. Pending final determination thereof, the court may at any time enter such restraining orders or prohibitions, or take such other actions, including the acceptance of satisfactory performance bonds, as it shall deem proper.

(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

(d) A final judgment or decree rendered in favor of the United States in any criminal proceeding brought by the United States under this chapter shall estop the defendant from denying the essential allegations of the criminal offense in any subsequent civil proceeding brought by the United States.

STATEMENT OF THE CASE

THE PARTIES AND THE DISPUTE

This action was brought by 34 overseas reinsurance companies and syndicates at Lloyd's of London for breach of contract; common law fraud, misrepresentation and non-disclosure; and violations of RICO and Massachusetts General Laws Chapter 93A in connection with a series of reinsurance[4] agreements known as the System and Non-System ("SANS") Treaties. The petitioners alleged that the respondents, a group of affiliated companies within the ITT-Hartford Group of Insurance Companies,[5] induced them to participate in the

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[4] Reinsurance is a form of insurance for insurance companies. It is a transaction that allows an insurance company that has assumed a risk by issuing an insurance policy (the "reinsured") to spread that risk more widely by transferring to one or more other companies or entities ("reinsurers") all or a portion of that risk. The reinsured agrees to pay the reinsurer a premium in return for the reinsurer's promise to indemnify the reinsured for all or a portion of the losses that it may sustain under the policy or policies it has issued. In order further to spread the risks it has assumed, a reinsurer may "retrocede" reinsurance business to other reinsurers, who are then referred to as "retrocessionaires."

[5] The defendant First State Insurance Company ("First State") wrote insurance, the defendant New England Reinsurance Corporation ("NERCO") wrote reinsurance, and the defendant Cameron and Colby Co., Inc. ("Cameron & Colby") provided management, marketing, underwriting, and other services to both First State and NERCO. The defendants are sometimes referred to herein collectively as "the Cameron & Colby companies."

SANS Treaties in the period 1980 to 1983 by making false representations and unfulfilled promises about the source, nature, and handling of the reinsurance risks the plaintiff retrocessionaires would receive.

THE GENESIS OF THE SANS TREATIES

In the early 1970s, Cameron & Colby was sold to ITT and became a subsidiary of the Hartford Fire Insurance Company ("the Hartford"). Its chief executive officer was Graves Hewitt, the son of one of the company's founders. Prior to 1978, the Hartford controlled Cameron & Colby, First State and NERCO in the sense of stock ownership but did not control those corporations in the sense of telling them how to run the day-to-day operations of their business. 14 Tr. 133-35, 15 Tr. 25.[6]

Like most insurers and reinsurers, the Cameron & Colby companies had two principal sources of income: investment and income underwriting profit. Underwriting profit is essentially the excess of premiums and commission income obtained over the amount of losses paid on a particular piece of business. Investment income is money earned on premiums obtained. 15 Tr. 26-28.

In 1978, the Hartford assumed control of the investment of premiums received by the Cameron &

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[6] References to "[Volume] Tr. [Page]" are to pages of the trial transcript. References to "Pl. Ex. __" are to plaintiffs' trial exhibits.

Colby companies. Underwriting profit, therefore, was the only source of income for which Cameron & Colby and its chief executive officer, Graves Hewitt, could, in any sense, take credit. 14 Tr. 135-40; Pl. Ex. 396. Mr. Hewitt believed that if he could produce an underwriting profit for the Cameron & Colby companies, the Hartford would not interfere with the internal management of those companies. 15 Tr. 26-28.

Mr. Hewitt's problem was that with rates on reinsurance in a depressed state, it was difficult to make an underwriting profit. He discussed his problem with Thomas Hearn of G.L. Hodson & Son, Inc. ("Hodson"), an intermediary[7] with whom he had a close and long-standing business relationship. One such discussion is reflected in a memorandum from Mr. Hearn to his file dated November 20, 1978, which states as follows:

> Graves' problem is that of the three sources of income (Underwriting Profit/ Cameron & Colby Management Income/Investment Income) his organization is credited with only the Underwriting Profit. He wants to convert as much of the Investment Income, as is possible, into Underwriting Income.

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[7] An "intermediary" is a broker who acts as the agent of the reinsured in procuring or "placing" reinsurance.

The memo further states that "Graves wants us to put our brains on the situation to develop that device or devices which will accomplish his goal." Pl. Ex. 44.

In 1979, the respondents created an entity known as Graham-Watson, which was incorporated in due course, to serve as the vehicle for converting investment income into underwriting profit. One of the devices they used to effect the conversion was the establishment of a reinsurance operation within Graham-Watson and the creation of the SANS Treaties to retrocede the reinsurance business handled by Graham-Watson.

The SANS Treaties were placed for Cameron & Colby with numerous overseas reinsurers, including the petitioners, by Hodson and various overseas corresponding brokers. App. A 4. Before entering into the treaties, the petitioners were provided with information describing the Graham-Watson reinsurance operation and the nature, source and handling of the risks to be ceded to the treaties. They were told that Graham-Watson would underwrite facultative[8] reinsurance produced on a direct basis, without the use of intermediaries, from selected primary companies. App. A 19.

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[8] "Facultative" reinsurance is one of two basic forms of reinsurance. Facultative reinsurance covers specific, individual risks. The other basic form of reinsurance, "treaty" reinsurance, covers broad groupings of risks on a bulk or wholesale basis.

Starting in 1980, Graham-Watson operated a reinsurance facility that provided fee and commission income to Graham-Watson. Contrary to the representations and promises made to the petitioners and other SANS retrocessionaires, NERCO failed to keep for itself the amount of underwriting risk that it had warranted in the contract. App. A 25; App. A 130-31. Additionally, contrary to the representation that Graham-Watson would cede direct business, it ceded business indirectly through managing general agents. App. A 26-27; App. A 113-22.

THE PROCEEDINGS BEFORE THE DISTRICT COURT

In January of 1987, certain of the petitioners brought this action against NERCO in order to obtain a preliminary injunction requiring NERCO to honor their right under the SANS Treaties to inspect NERCO's books and records to determine how the business had been conducted.

On February 27, 1987, the district court (Nelson, J.) entered an order in accordance with an agreement between the parties allowing the inspection to proceed. The inspection revealed that the defendants had misrepresented the source, nature and handling of risks ceded to the SANS Treaties.

On July 12, 1988, the petitioners filed a motion seeking leave to add First State and Cameron & Colby as parties defendant, to add as parties plaintiff several additional retrocessionaires who had conducted a separate and independent inspection, and to amend the complaint to set forth the claims uncovered by the inspections. On

December 12, 1988, the district court (Cohen, M.) granted the motion to amend.

Thereafter, the respondents filed several motions for summary judgment. One of respondents' motions, filed on January 21, 1993, sought summary judgment on petitioners' RICO claims on the grounds that the petitioners could not meet the special injury requirements imposed by sections 1962(a) and (b), nor could they demonstrate that the defendant "persons" were separate from the RICO "enterprise" as required by section 1962(c). On February 26, 1993, the district court (Harrington, J.) denied the motion.

The case was then tried to the district court sitting without a jury in April and May 1993. In its Memorandum And Order, dated June 7, 1993, the court (Harrington, J.) held that NERCO had breached its contract with the petitioners, committed common law fraud and engaged in unfair and deceptive trade acts and practices in violation of Chapter 93A of the Massachusetts General Laws. App. A 37. The court further held, as a matter of law, but without substantive analysis, that the petitioners were not entitled to relief under RICO. Specifically, the district court stated:

> the Court rules, as a matter of law, that Title 18, United States Code, Sections 1961 - 1968 do not apply to the facts of this case on the ground that the Plaintiffs have failed to establish that they suffered an "investment" injury under Section 1962(a) or an "acquisition" injury under

> Section 1962(b) or that the three Defendants were separate persons as required under Section 1962(c).

NERCO appealed from the judgment awarded in favor of the petitioners on their state law claims. App. A 38 n.9. The petitioners cross appealed from the judgment denying their claims under RICO.

THE PROCEEDINGS BEFORE AND DECISION BY THE FIRST CIRCUIT

On June 19, 1995, the First Circuit issued a one hundred page opinion affirming and reversing various findings of the district court, vacating the Amended Judgment, and remanding for further findings. Though it vacated the judgment, it affirmed the critical finding that NERCO had committed a fraud upon the petitioners through its failure to cede direct business from primary companies as promised. App. A 113-22.

The First Circuit also affirmed the decision of the trial court with respect to the petitioners' RICO claims. It held, as a matter of law, that the petitioners were required to prove an "investment" or "acquisition" injury to state a cause of action under 18 U.S.C. §§ 1962(a) and 1962(b), respectively.[9] App. A 140-44.

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[9] The First Circuit also affirmed the district court's holding that the petitioners could not state a cause of action under 18 U.S.C. § 1962(c). That holding is not a subject of this Petition.

REASONS FOR GRANTING THE WRIT

I. THE DECISION OF THE FIRST CIRCUIT REQUIRING PETITIONERS TO PROVE THEY SUFFERED AN "INVESTMENT INJURY" TO DEMONSTRATE A VIOLATION OF 18 U.S.C. § 1962(a) CONFLICTS WITH THAT OF THE FOURTH CIRCUIT.

A civil plaintiff may assert a cause of action under RICO where it can demonstrate that it has been "injured in his business or property by reason of a violation of section 1962 of this chapter." 18 U.S.C. § 1964(c). A defendant violates § 1962(a) by:

> receiv[ing] any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, and us[ing] or invest[ing], directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

The Circuit Courts are divided on the question whether a civil plaintiff must prove not only that it was injured by the predicate acts of a pattern of racketeering, but also that

it was injured by the fact of the investment in order to state a cause of action based on a violation of § 1962(a).

Relying on this Court's opinion in Sedima, S.P.R.L. v. Imrex Co., Inc., 473 U.S. 479 (1985), and American Nat'l Bank & Trust Co. of Chicago v. Haroco, Inc., 473 U.S. 606 (1985), the Fourth Circuit rejected the investment injury rule adopted in this case by the First Circuit, and held:

> [W]e conclude that a similarly unfounded "investment injury" rule has no place in § 1964(c). Although the complaints in Sedima and Haroco were filed under § 1962(c), it is clear that the Supreme Court was referring to § 1962 as a whole in both cases, and in fact cited § 1962(a) and the offense it defines in Sedima. See 473 U.S. at 495, 105 S. Ct. at 3284. Rather than construing § 1962(a) as imposing a direct injury requirement in § 1964(c) actions, we believe that Sedima instructs us to employ a traditional causation analysis in determining whether a RICO plaintiff has been injured "by reason of" a section 1962 violation. [citations omitted]

Busby v. Crown Supply, Inc., 896 F.2d 833, 839 (4th Cir. 1990). Thus, the Fourth Circuit concluded that a plaintiff could prove a claim under § 1964 based on a violation of § 1962(a) by proving that it was injured by the predicate acts which constituted the RICO violation, without the

need to prove an additional injury resulting from the defendant's investment activities.

In Sedima, the Supreme Court reversed a decision of the Second Circuit requiring plaintiffs whose actions were based on violations of § 1962(c) to prove a "racketeering injury." The Supreme Court held that there are no "special injury" requirements and that injuries are compensable if they flow from the predicate acts of racketeering. Sedima, 473 U.S. at 494-97. The Court reasoned that the imposition of a "racketeering injury" requirement was belied by the express language of the statute:

> Section 1964(c) authorizes a private suit by "[a]ny person injured in his business or property by reason of a violation of § 1962." Section 1962 in turn makes it unlawful for "any person"--not just mobsters--to use money derived from a pattern of racketeering activity to invest in an enterprise, to acquire control of an enterprise through a pattern of racketeering activity or to conduct an enterprise through a pattern of racketeering activity. §§ 1962(a)-(c). If the defendant engages in a pattern of racketeering activity in a manner forbidden by these provisions [§§ 1962(a)-(c)], and the racketeering activities injure the plaintiff in his business or property, the plaintiff has a claim under § 1964(c). There is no room

> in the statutory language for an additional, amorphous "racketeering injury" requirement.

Id. at 495 (emphasis added).

Based on the statute's "self-consciously expansive language and overall approach" and the "express admonition [in the statute] that RICO is to `be liberally construed to effectuate its remedial purposes,'" the Court concluded that "RICO is to be read broadly." Id. at 497-98 (quoting Pub. L. 91-452, § 904(a), 84 Stat. 947).

While agreeing with the circuit court that private civil RICO actions had diverged from the original conception of the statute as a weapon against organized crime, it rejected the notion that judicial activism was the proper method of changing the situation: "It is not for the judiciary to eliminate the private action in situations where Congress has provided it"; rather, if there is a problem with RICO, "its correction must lie with Congress." Id. at 499-500. Congress has taken no action in this regard.

Despite the clear language of this Court's decision in Sedima, the First Circuit in this case followed the decisions of other Circuits in imposing a requirement of proof of "investment injury" to recover for a violation of § 1962(a). App. A 142 ("Thus, in proving a right to recover for a RICO violation premised upon § 1962(a), the plaintiffs had to prove that they were harmed by reason of NERCO's use or investment of income derived from a pattern of racketeering activity. . . ." (emphasis in original)). See Ouaknine v. MacFarlane, 897 F.2d 75, 82

(2d Cir. 1990); Glessner v. Kenny, 952 F.2d 702, 708-10 (3d Cir. 1991); Parker & Parsley Petroleum v. Dresser Indus., 972 F.2d 580, 584 (5th Cir. 1992); Nugget Hydroelec. L.P. v. Pacific Gas & Elec. Co., 981 F.2d 429, 437-38 (9th Cir. 1992), cert. denied, -- U.S. --, 113 S.Ct. 2336 (1993); Grider v. Texas Oil & Gas Corp., 868 F.2d 1147 (10th Cir.), cert. denied, 493 U.S. 820 (1989); Danielson v. Burnside-Ott Training Ctr., 941 F.2d 1220, 1239-40 (D.C.Cir. 1991).

The principal rationale these courts have advanced to justify the imposition of an investment injury requirement is the same discredited rationale advanced by the Second Circuit in Sedima: "the plain language" of the statute compels the result. E.g., Ouaknine v. MacFarlane, 897 F.2d 75, 82-83 (2d Cir. 1990). Recognizing that a violation of § 1962(a) clearly requires proof of both receipt of income from the commission of predicate acts forming a pattern of racketeering and the use or investment of that income in an enterprise, the Second Circuit simply concluded, without analysis, that "the essence of a violation of § 1962(a) is not commission of predicate acts but investment of racketeering income." Id. at 83. Therefore, the court maintained, a plaintiff can be injured "by reason of" a violation of § 1962(a) only if he is injured by reason of the investment of racketeering income. Id.

The plain language of § 1962(a) strongly suggests that the essence of a violation of that section is the commission of the predicate acts, not the investment of the proceeds of racketeering activity. It expressly provides that a defendant person can be liable only for racketeering

activity "in which such person has participated as a principal." 18 U.S.C. § 1962(a). There is no requirement, however, that the defendant person participate as a principal in the investment of the racketeering income. The focus of the statute, therefore, is on the creation of the income through the racketeering activity and the predicate acts. Were the focus on the investment, as the Second Circuit assumes, Congress would have mandated that the defendant be a principal in the investment or use of the proceeds.

The search for the "essence" of a § 1962(a) violation is, of course, ultimately futile and counterproductive. It is obvious that two conditions must both be met in order to find a violation. Once the violation is proven, however, "[n]othing in the 'by reason of' language of 1964(c) . . . limits the compensable racketeering injuries to those sustained by the second prong, i.e., after the investment and/or use of the income." Busby, 896 F.2d at 837 (emphasis in original). Injury by either or both elements of the "violation" would constitute injury "by reason of a violation of section 1962" and therefore authorize recovery. Id. at 837-38; see 18 U.S.C. § 1964(c); G. Robert Blakey, An Analysis of the Myths that Bolster Efforts to Rewrite RICO and the Various Proposals for Reform: "Mother of God -- Is this the End of RICO?", 43 Vand. L. Rev. 851, 859 n.29 (1990) (Analytically, injury in § 1962(a) litigation may flow from the racketeering acts or the investment (or use of the income or its proceeds) in an enterprise, or both.)

Not only is the investment injury requirement contrary to the plain language of the statute, but it is also

inconsistent with RICO's liberal construction clause. In many cases, a special investment injury requirement will make it virtually impossible to prove a claim against a corporate defendant, thereby frustrating the expressed intent of the Congress. Busby, 896 F.2d at 839.

This case presents an appropriate opportunity for this Court to resolve the split between the Circuits and reconcile the decisions of the majority of Circuit Courts with those of this Court in this area. The case presents a simple question of law. The fact that NERCO acted fraudulently towards the petitioners has been affirmed. App. A 113-22. The First Circuit's ruling on RICO constitutes a final judgment on this issue. There are no federal issues to be decided upon the remand to the district court.

Further, it is in the interest of judicial economy to resolve the legal issues relating to RICO while the case remains with the district court on remand. The reversal of the First Circuit's decision now will allow the district court to make necessary factual findings under RICO which are not now part of the record. Such a proceeding could well eliminate the need for another remand at a future date.

II. THOUGH THE DECISION OF THE FIRST CIRCUIT REQUIRING PETITIONERS TO PROVE AN ACQUISITION INJURY TO PROVE A VIOLATION OF 18 U.S.C. § 1962 (b) DOES NOT DIRECTLY CONFLICT WITH THAT OF ANOTHER CIRCUIT, ITS CONCLUSION ON THIS POINT IS APPROPRIATELY CONSIDERED AT THIS TIME.

The issue of the "acquisition injury" requirement under 18 U.S.C. § 1962(b) is nearly identical to that of the "investment injury" requirement under § 1962(a). The "acquisition injury" rule requires a plaintiff to prove that it was injured, not by the defendant's racketeering activities, but rather by the defendant's acquisition or maintenance of control over the enterprise. Though the decisions of the only Circuits to decide the issue have imposed an "acquisition injury" requirement, their rationale for doing so mirrors the rationale underlying the "investment injury" requirement. App. A 142-43; Lightning Lube, Inc. v. Witco Corp., 4 F.3d 1153, 1190 (3d Cir. 1993); Old Time Enters. v. International Coffee Corp., 862 F.2d 1213, 1219 (5th Cir. 1989) (pre-Sedima); Danielsen v. Burnside-Ott Aviation Training Ctr., 941 F.2d 1220, 1231 (D.C. Cir. 1991).

Similarly, the reasons for abandoning the "acquisition injury" requirement mirror the reasons for abandoning the "investment injury" requirement. The "acquisition injury" requirement conflicts with the plain language of the statute and the clear intent of this Court's decision in Sedima. Logic compels that the causation requirements imposed by § 1964(c) on claims grounded on all subsections of § 1962 be equivalent.

For all of the reasons stated above in the discussion regarding "investment injury," this Court should review the First Circuit's decision with respect to the "acquisition injury" requirement at this time.

CONCLUSION

For the foregoing reasons, this Court should grant its Writ of Certiorari to review the decision of the United States Court of Appeals for the First Circuit in this matter.

Respectfully submitted,

PETITIONERS,
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APPENDIX

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UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

COMPAGNIE DE REASSURANCE D'ILE DE FRANCE, ET AL., Plaintiffs,	) CIVIL ACTION
v.	) No.: 87-10027-H
NEW ENGLAND REINSURANCE CORPORATION, ET AL., Defendant.	)

MEMORANDUM AND ORDER

June 7, 1993

HARRINGTON, D.J.

This is a case tried to a Judge sitting without a jury. Plaintiffs are 34 reinsurance syndicates, reinsurance companies and members of reinsurance pools,[1] which,

[1]The following Plaintiffs are Lloyds syndicates: (1) A.A. Cassidy & Others, (2) B.P.D. Kellet & Others, and (3) C.J. Warrilow & Others.

The following Plaintiffs are non-Lloyds

reinsurance companies: (4) Compagnie de Reassurance d'Ile de France, (5) Group Josi Reinsurance Company S.A., (6) Hanseatica Ruckversicherungs Aktiengesellschaft, (7) Imperio Reinsurance Company (U.K.) Limited, (8) Uni-Polaris Forsikringsaksjelskap, (9) Sampo International Insurance Company Limited, (10) Societa Assicuratrice Industriale SPA, (11) Universale Ruckversicherungs Aktiengesellschaft, and (12) Terra Nova Insurance Company Limited.

The following Plaintiffs are members of the TGI Anstalt Pool: (13) Atlantica Insurance Company Limited, (14) De Centrale Herzverzekering N.V., (15) The General of Berne Insurance Company, (16) Kansa Reinsurance Company Limited, (17) Otso Loss of Profits Insurance Company Limited, (18) Samvirke Skadeforsikring A/S, (19) Transatlantica Reinsurance Company N.V., (20) RVS Schadeverzekering N.V. , (21) Enterprise-Fennia Mutual Insurance Company, (22) Finnish Marine Insurance Company Limited, and (23) WASA International Insurance Company Limited.

The following Plaintiffs are members of the Aurora Pool (later known as the English and American Pool) : (24) English & American Insurance Company Limited, (25) City International Insurance Company Limited, (26) Fuji International Insurance Company Limited, (27) Lombard Continental PLC, (28) Nippon Insurance Company of Europe Limited, (29) Pohjola Insurance Company (U.K.) Limited, and (30) Kemper Reinsurance London Limited.

The following Plaintiffs are reinsurance companies which are also members of the TGI Anstalt

from February 1, 1980 through 1983, entered into reinsurance Treaties (the "SANS Treaties") with Defendant New England Reinsurance Corporation (NERCO), the Reinsured under the Treaties. Some of the Plaintiffs entered into Treaties for each of the four years from 1980 to 1983. Others were parties to Treaties for one, two or three of the four years. For each year, there was a new contract. "SANS" stands for "System and Non-System."

Defendants are a group of three affiliated companies within the Hartford Group of Insurance Companies. First State Insurance Company ("First State") wrote primarily excess and surplus lines of insurance. New England Reinsurance Corporation ("NERCO") wrote reinsurance. And, Cameron and Colby Co., Inc. ("Cameron and Colby"), provided management, marketing, underwriting, and other services to both First State and NERCO.

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pool: (31) Industrial Mutual Insurance Company, and (32) Pohjola Insurance Company.

(33) Kansa General International Insurance Company Limited is a member of the TGI Anstalt and the Vara Pooli pools, and (34) Tapiola International Insurance Company Limited is an insurance company which is a member of both the TGI Anstalt and Vara Pooli pools.

Plaintiffs Pohjola Insurance Company Ltd. and Pohjola Insurance Company (UK) Limited were dismissed on motion of the Defendants with the consent of the Plaintiffs during the course of the trial.

With the approval of the Hartford and ITT, Cameron and Colby established a division known as Graham Watson. The purpose of the Graham Watson division was twofold. First, Graham Watson was to participate in the property and casualty facultative reinsurance business which had traditionally been dominated by direct reinsurance writers. Second, it was to rationalize the facultative placements of both the Hartford and the First State, and to provide retrocessionaires with a broad cross section of facultative reinsurance emanating from those two companies.

Through the United States based insurance broker, G.L. Hodson & Son Inc. ("Hodson") , and various European sub-brokers,[2] NERCO, the original reinsurer, pursuant to the Treaties at issue in the instant case, ceded certain reinsurance business to the Plaintiff retrocessionaires. These cessions, the contractual terms which govern them, and representations allegedly made in connection with them, are the subject of this litigation.

Three documents are particularly relevant to a proper review and resolution of these issues. First, there is the Placing Information, which forms the basis for the initial negotiations between a cedent, like NERCO, and retrocessionaires, like the Plaintiffs. Second, there is the Slip, which constitutes, in an abbreviated form, the

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[2]The sub-brokers included: Sedgwick Payne (formerly Bland Payne); Anglo-Swiss Reinsurance Brokers Ltd.; Carter Brito E Cunha Ltd.; Fielding & Partners; and Jardine Thompson Graham Ltd.

contract between the cedent and the retrocessionaires. And, finally, there is the "Treaty Wording," the formal contract, whose terms are consistent with the Slip and with any amendments thereto agreed upon subsequent to the Slip's being executed. It is often finalized months after the Slip has been signed.

In their complaint, Plaintiffs allege four claims against the Defendants. They allege that NERCO breached the terms of the SANS Treaties, and that, with the other Defendants, NERCO fraudulently induced Plaintiffs to enter into the SANS Treaties. In addition, Plaintiffs allege claims against all Defendants for violation of both ch. 93A, §2, of the General Laws of the Commonwealth of Massachusetts and the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-1968 (1991) (RICO) Plaintiffs pray that the Court rescind the SANS Treaties, and seek a trebling of their damages, together with an award of their attorneys' fees incurred in prosecuting this action and of their experts' fees incurred in undertaking the inspection of NERCO's books and records, pursuant to Chapter 93A of the Massachusetts General Laws and RICO.

The Defendants deny the allegations of the Plaintiffs, and counterclaim for breach of contract, violation of Chapter 93A, and for reformation of the contract. They pray that the Court declare the rights, obligations and liabilities of the parties under the SANS Treaties; award judgment in the amount currently owing under the terms of the SANS Treaties; issue an order that Plaintiffs pay any and all future claims pursuant to the terms of the SANS Treaties; issue an order that Plaintiffs

comply with the letter of credit provisions of the SANS Treaties; award treble damages, costs and expenses pursuant to Chapter 93A of the Massachusetts General Laws; and reform the Special Surplus Treaties to conform with the agreements as stated in the Slips.

The Placing Information which European sub-brokers presented to the Plaintiff reinsurers on behalf of NERCO to persuade reinsurers to participate in the SANS Treaties typically contained the following information:

> The Graham Watson division has recently been established by Cameron & Colby after a lengthy study of the facultative reinsurance operations in North America. This project has been discussed by Cameron & Colby with the Hartford and ITT, who have given their approval and support for this project.

The purpose of the Graham Watson division is twofold:

1. To participate in the property and casualty facultative reinsurance business which is currently dominated by the direct writers.

2. To rationalize the facultative placements of both the Hartford and the First State not only from an administration point of view but also to provide the

retrocessionaires with a broad cross section of facultative reinsurance emanating from these two companies.

A recent analysis conducted by a leading reinsurance executive has indicated that out of a total facultative reinsurance premium, both property and casualty ceded by U.S. companies of approximately 1.5 billion per annum, over 80% is non-brokered and placed significantly with the direct professional reinsurance market. Graham Watson is charged with the responsibility of penetrating this business, to be written in the New England Reinsurance Corporation. Facultative reinsurance emanating from reinsurance intermediaries will continue to be written separately through NERFAC.

It is not the intention that Graham Watson will seek facultative reinsurance on a wholesale basis from all and sundry but it is the intention that it shall develop a close working relationship with selected primary companies.

It is appreciated that it will take time to establish these relationships on a proper and sound basis and therefore in the meantime the majority of business will

emanate from the "System" which is essentially the Hartford and First State.

The majority of this business is presently ceded to the direct writing reinsurers, and therefore the business underwritten by Graham Watson will be almost entirely business which has not and would not be available to the brokered reinsurance market.

It is not intended that Graham Watson will absorb all the facultative reinsurance requirements of either the Hartford or First State. However, it is the intention that the reinsurances to be arranged will receive a sufficient cross section of this business and will develop a mutually profitable relationship between New England Reinsurance Corporation and its retrocessionaires.

It is estimated that by the end of 1980 the premium on an annualized basis will be $20M divided approximately 60% casualty and 40% property. This does not take into consideration any Non-System business.

The commission allowances proposed are not inconsistent with terms allowed in the facultative marketplace on subject matter business.

It should be noted that there is no profit commission on the casualty business, but on both property and casualty an allowance will be made at the end of each year on the earned premiums so that NERCO may share in the investment income.

A Slip, representative of that executed by the Plaintiff reinsurers and constituting the contract in its abbreviated form, contains, in pertinent part, the following terms:

* * * * * * * *

TYPE	PROPERTY AND CASULTY SURPLUS TREATY
INTEREST	Business classified by the Reassured as Property and Casualty Facultative Assumed business produced and underwritten by the Graham Watson division of Cameron & Colby Co., Inc.,
	EXCLUSIONS: As per Schedules attached and/or

to be agreed Leading Underwriter only.

TREATY DETAIL

SECTION A - PROPERTY

Five (5) lines subject to a cession limit of $5,000,000 as respects any one risk.

The Reassured's minimum net retention hereunder shall be $250,000 as respects any one risk.

SECTION B - CASUALTY

Five (5) lines subject to a cession limit of $5,000,000 as respects any one risk.

As respects certificates which provide for an aggregate limit of liability and which attach during the currency of this

Reinsurance, it is understood and agreed that all loss or losses subject to such aggregate limit occurring thereunder shall, for the purposes of this Reinsurance, be deemed to have occurred at the inception date of each certificate period. As used herein the term "certificate period" shall mean each aggregate period of a certificate which provides for aggregate limits of liability, not to exceed one (1) year plus odd time.

The Reassured's minimum net retention hereunder shall be $250,000 as respects any one risk.

As respects both Sections A and B, the Reassured shall be the sole judge of what constitutes one risk and

the net retention appropriate thereto.

However the Reassured will not knowingly cede to this Contract more than $5,000,000 where there is an identifiable accumulation of limits which are subject to one loss arising out of the same cause.

WARRANTIES

1) All cessions hereunder in respect of "System Business" not to exceed 50% of original reinsurance limit.

2) Reassured co-reinsure for 10% participation on all "System Business" ceded hereunder.

RATE

Gross original Rates Written Premiums Basis

COMMISSION

SECTION A - PROPERTY

1) Thirty-one and one-half percent (31 ½%) on the net written premiums ceded hereunder as respects business assumed on a pro-rata basis. Twelve and one-half percent (12 ½%) on the net written premiums ceded hereunder as respects business assumed on an excess of loss basis.

2) In addition, at the close of each calendar year, Reinsurers shall make to the

Reassured a further allowance equal to one percent (1%) of the annual premium earned hereunder.

SECTION B - CASUALTY

1) Twenty-eight and one-half percent (28 ½%) on the net written premiums ceded hereunder as respects business assumed on a pro-rata basis. Eleven and one-half percent (11 ½%) on the net written premiums ceded hereunder as respects business assumed on an

excess of loss basis.

2) In addition, at the close of each calendar year, Reinsurers shall make to the Reassured a further allowance equal to four percent (4%) of the annual premium earned hereunder.

* * * * * * * *

GENERAL CONDITIONS

As respects so-called "System Business" ceded to this Treaty, the net retention borne by a Company within the System, other than the Reassured, shall constitute compliance with the net retention requirement hereon. There insurance hereunder shall apply in respect of losses

occurring as defined in the Reassured's certificates. LOC's as required by the Reassured for Unearned Premiums and Outstanding losses in respect of Non-Authorized Reinsurers only.

For purposes of the net retention requirement hereon as regards "System Business," quota share and excess of loss reinsurance maintained by a company within the System shall be disregarded.

For purposes of the net retention requirement hereon as regards "Non-System Business," only excess of loss reinsurances maintained by the Reassured shall be disregarded.

Errors and Omissions Clause

Insolvency Clause

G.L. Hodson & Son, Inc., Intermediary Clause (1978).

WORDING

To be agreed Leading Underwriter only.

INTERNAL ARRANGEMENT

Signing slips, special agreements and acceptances hereunder, provided Treaty Limits are not exceeded, to be agreed by Leading Underwriter only.

Renewals of risks previously specially agreed, to be accepted without further agreement.

PORTFOLIO TRANSFER OF UNEARNED PREMIUMS - Assumption and return where applicable.

Agree issue separate signing slips and Contract Wordings, if

required. (Signing slips t.b.a L/U only).

It was the agreement of the parties under the terms of the Treaties that Graham Watson would produce and underwrite property and casualty facultative reinsurance, that is, reinsurance underwritten on an individual risk certificate basis.

NERCO made the following four material representations to the Plaintiff reinsurers to induce them to enter into a contractual relationship, and the Plaintiff reinsurers did rely on said representations in entering into the SANS Treaties:

1. That Graham Watson would produce and underwrite property and casualty facultative reinsurance. This representation means that Graham Watson would underwrite reinsurance on an individual, risk-by-risk, certificate basis.

2. That Graham Watson would produce such reinsurance directly from system and non-system original insurers without the use of any intermediaries. This representation means that Graham Watson would be a direct writer of reinsurance from the original insurer, which reinsurance cessions would not be brokered.

3. That the Hartford Companies, along with First State, would be the "system business" original insurers. This representation means that the Hartford Insurance Group would be the source of "system business." The Hartford Insurance Group is made up of the so-called Hartford Companies and First State, an excess and surplus line carrier.

4. That Graham Watson would seek facultative reinsurance business from selected primary companies, rather than on a wholesale basis. This representation means that Graham Watson would assume reinsurance from selected insurance companies, not reinsurance companies or Managing General Agents, that is, from risk-bearing insurance entities.

In brief, NERCO represented that Graham Watson would underwrite facultative reinsurance, that is, underwritten on an individual risk certificate basis, produced from selected primary insurance companies, risk-bearing entities, including the Hartford Insurance Group Companies, directly, without the use of intermediaries. Phrased differently, NERCO represented that Graham Watson would establish a direct relationship with primary insurance companies to produce reinsurance business which Graham Watson would underwrite facultatively, that is, on an individual risk certificate basis.

The Plaintiff reinsurers were notified in late 1980 by means of Anniversary Placing Information, prepared in contemplation of the 1981 renewal of the SANS Treaties, that:

A. To date, the preponderance of the business has been assumed from First State Insurance Company and written on a pro rata basis; and

B. "Non-system business" represents a relatively small proportion of the total and what has been written is limited to Casualty business on an excess of loss basis emanating from Baccala and Shoop Insurance Services.

During the tenure of the SANS Treaties, NERCO assumed business not only from First State Insurance Company, but also from other Hartford Companies, including Hartford Specialty Company, Nutmeg Insurance Company, and Twin City Insurance Company. The Hartford Companies' business, excluding First State, was classified as "non-system business."

A fundamental issue in this case is whether Graham Watson did underwrite facultative reinsurance on the "system business" emanating from First State and on the "non-system business" emanating from the Managing General Agent, Baccala and Shoop, and from other sources, such as Crum and Forster Insurance Company, Harbor Insurance Company, Zurick Insurance Company, Allstate Insurance Company, Puritan Insurance Company,

Allianz Underwriters, Inc., the intermediary G. L. Hodson, the Managing General Agent RFC Management Company, the Managing General Agent Guy Carpenter, American Reinsurance Company, Constitution State Insurance Company, Hartford Specialty Company and others. The majority of "non-system business" emanated from Baccala and Shoop, a Managing General Agent, through the intermediary G. L. Hodson.

The second fundamental issue is whether Graham Watson produced "non-system business" by establishing direct relationships with primary, risk-bearing, insurance companies.

Graham Watson underwrote reinsurance on business emanating from both "system" and "non-system" business by means of the "automatic" and/or "semi-automatic" method of underwriting.

"System business" emanating from First State was underwritten by means of an arrangement between First State and Graham Watson; "non-system business" was underwritten by means of formal contractual relationships called facilities between Graham Watson and its ceding sources.

In underwriting "non-system business," Graham Watson denominated the facilities under which its "automatic" and/or "semi-automatic" underwriting was

done as "Master Facultative Certificates" ("MFCs") .[3] "Non-system" sources ceded their reinsurance to Graham Watson by means of the "MFCs" facilities, all but a very few of which facilities had been brokered by various intermediaries, including G. L. Hodson.

The "automatic" and/or "semi-automatic" method of underwriting is done on the basis of bordereau risk submissions or by "layoff sheets," rather than on the basis of individual risk submissions, as is done in facultative risk-by-risk certificate underwriting. In this case, bordereau were used for "non- system" cessions and "layoff sheets" for "system" cessions.[4] A microfiche, a copy of First State's underwriting file on a particular risk, would be submitted to Graham Watson only when

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[3]An MFC is one certificate covering the cession of many risks from the same source issued by the original reinsurer to the ceding company with a delegation of underwriting authority being granted to the ceding company; in contrast, an individual facultative certificate is issued by the original reinsurer to the ceding company, after the individual risk has been facultatively underwritten by the underwriter of the original reinsurer.

[4]A risk bordereau is a multiple risk submission with a brief one-line summary which includes the name of the insured and policy number, the name of the risk, the period of the risk, the amount being reinsured, policy limits, retention, and net premium ceded. A "layoff sheet" is not technically a bordereau, but is an accounting document. In property business, however, it performs the function of a bordereau.

expressly requested by Graham Watson and only after the cession of the risk to the SANS Treaties had been consummated.

An individual risk submission is one made to a facultative reinsurance underwriter who would examine the individual risk offer, negotiate the terms of any acceptance, deliberate on his decision, and then would decide whether to accept the individual risk and either allocate it to a Treaty or to decline it. If he accepted the individual risk, he would then issue an individual facultative certificate to the ceding source.[5]

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[5]Dr. Klaus Gerathewohl et al in the authoritative work Reinsurance Principles and Practice, Volume II, Chapter 14, Particular Aspects of Facultative Reinsurance, 1. The nature of facultative reinsurance, defined facultative reinsurance as follows:

> Facultative reinsurance always covers a single risk. The direct (primary) insurer, after deducting his retention and the cession to his obligatory reinsurance treaties, is then at liberty to decide whether -- and if so, to what extent -- he required reinsurance of his remaining liability. He is also free to select a suitable reinsurer of his choice for each individual risk. The reinsurer, in turn, can also decide at his own free will whether, to what extent, and at what reinsurance terms and premiums he

In contrast, the bordereau used here were multiple risk submissions from the ceding party which provided summary details on reinsurance policies. They were submitted periodically to the reinsurance underwriter at Graham Watson for post-attachment risk analysis after the risks had already been automatically allocated by the ceding source to the SANS Treaties. Graham Watson would conduct periodic "audits" of the records of the ceding entities many months after the risks had already attached to the SANS Treaties.

The distinction between the "automatic" and "semi-automatic" method of underwriting is that the "automatic" method permits the reinsurance underwriter to only cancel its contract with the original insurer, for it provides for no "right to reject" an individual risk; while the "semi-automatic" method authorizes the underwriter to reject the cession of an individual risk. However, the "right to cancel" and the "right to reject" are effective only at the time the right is exercised by the reinsurance underwriter and well after the reinsured risks had attached

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would like to assume a share in a risk offered to him by way of facultative reinsurance. In each case, therefore, an individual reinsurance agreement is entered into for each individual risk, the parties thereto having the power to decide at their own free will whether they are desirous of seeking or accepting such reinsurance (thus the term "facultative" reinsurance).

to the SANS Treaties. In brief, neither the "automatic" "right to cancel" nor the "semi-automatic" "right to reject" were effective ab initio, that is, from the date the risk had attached to the SANS Treaties.

All "system business" emanated from First State, an excess and surplus line carrier, during the tenure of the SANS Treaties. No "system business" emanated from the other Hartford Companies. The First State insurance underwriter accepted risks and, by means of a "layoff sheet," automatically allocated a portion of the risks to the SANS Treaties.

Most "non-system business" emanated from Managing General Agents, which are not risk-bearing insurance entities, or from reinsurance intermediaries, and was not directly placed by primary insurance companies with Graham Watson. Graham Watson, under Master Facultative Certificate facilities, delegated its underwriting authority to the ceding sources or to the intermediaries, who automatically allocated the risks to the SANS Treaties.

There is no evidence that Graham Watson did adequate individual risk underwriting even after the risks had attached to the SANS Treaties. Neither risk bordereau nor "layoff sheets" provided Graham Watson with the quantity or quality of information it needed to facultatively underwrite the risks ceded to the SANS Treaties. Most notably lacking from both bordereau and "layoff sheets" was any reference to the loss experience as regards the risk to be ceded. Such loss experience information, which assists an underwriter in predicting

future losses, is essential to the facultative underwriting process. Also lacking was a detailed description of the risk that was ceded to the SANS Treaties. "Layoff sheets" set forth only the name of the original insured and a minimalist description of their operations, referring, for example, to the insured's operations as "Restaurants et al." Similarly, bordereau provided Graham Watson with little information concerning the nature of the risk to be reinsured. In one representative instance, bordereau described an insured's operations as "Door and Hatchway MFG." Such descriptions do not adequately present the risks inherent in or associated with the operation of the insured.

Significantly, First State files reflect that Graham Watson never rejected any risk ceded by First State during the entire course of the SANS Treaties; and, as of February 23, 1983, Baccala and Shoop reported that Graham Watson had never rejected any risk which Baccala and Shoop had ceded to the SANS Treaties. Such circumstances belie Defendant NERCO's defense that Graham Watson did facultatively underwrite the risks ceded under the SANS Treaties.

From the very inception of the negotiations leading to entering into the SANS Treaties with the Plaintiff reinsurers, Defendant NERCO planned to employ the "automatic" and/or "semi-automatic" method of underwriting both "system" and "non-system" business, even though its sub-agents, unaware of NERCO's secret intention, were negotiating a treaty in which the underwriting would be done on an individual risk certificate basis.

Upon a review of the evidence, the Court finds that Graham Watson did not facultatively underwrite, that is, underwrite on an individual risk certificate basis as represented, any of the "system business" nor virtually any of the "non-system business"; Graham Watson underwrote all "system business" and virtually all "non-system business" by the "automatic" and/or "semi-automatic" method of underwriting.

The Court also finds, on the basis of the evidence, that most of the "non-system business" emanated from MGAs through the use of intermediaries and from intermediaries themselves, and was not produced from primary risk-bearing insurance entities directly. Although the Plaintiff reinsurers were aware that Baccala and Shoop, an MGA, had ceded to the SANS Treaties approximately five percent of the total business during the first year, 1980, they were never apprised that, during the ensuing three years, Baccala and Shoop would cede the majority of "non-system business" and that other MGAs and intermediaries would cede, in conjunction with Baccala & Shoop, most of the "non-system business" to the SANS Treaties. "Non-system business" constituted, over the course of the SANS Treaties, approximately one-half of the total business ceded to the Treaties.

Plaintiffs have stated a claim against the Defendants for common law fraud. In order to prevail on that claim, they must prove by clear and convincing evidence that Defendants made a false representation of material fact with knowledge of its falsity for the purpose of inducing Plaintiffs to act thereon, and that Plaintiffs relied upon that representation as true and acted upon it to

their detriment. Logan Equipment Corp. v. Simon Aerials, Inc., 736 F. Supp. 1188, 1199 (D. Mass. 1990); Danca v. Taunton Savings Bank, 429 N.E.2d 1129, 1133 (Mass. 1982); Slaney v. Westwood Auto Inc., 322 N.E.2d 768, 779 (Mass. 1975); Powell v. Rasmussen, 243 N.E.2d 167, 168-9 (Mass. 1969); Zimmerman v. Kent, 575 N.E.2d 70, 74 (Mass. App. Ct. 1991).

Courts considering reinsurance disputes have refined and elaborated on the common law as it relates to misrepresentation. In the reinsurance context, they have focused their attention specifically on the obligations of the reinsured and the reinsurer to exercise good faith and to disclose all material facts. 13 A.J. Appleman and J. Appleman, Insurance Law and Practice § 7693, at 505 (1976). Adopting language common in the reinsurance industry, the Supreme Court described such obligation as being one *uberrimae fidei*, or "of utmost good faith." Sun Mutual Insurance Co. v. Ocean Insurance Co., 107 U.S. 485, 510 (1882). The Court explained that "the duty of communication, indeed, is independent of the intention, and is violated by the fact of concealment even where there is no design to deceive." Id. More recently, Judge Coffin, writing for the First Circuit, acknowledged the special relationship that exists between reinsured and reinsurer. In A/S Ivarans Rederei v. Puerto Rico Ports Authority, he noted,

> As between the reinsured and the reinsurer, there is no principle of imputed knowledge of facts material to the risk that the reinsurer is asked to assume; to the contrary, there is a duty on the

> reinsured to disclose such facts. Indeed, were this not so, the business of reinsurance would rest on blind faith in the reinsured.

617 F.2d 903, 905 (1st Cir. 1980).

Plaintiffs have also stated a claim for breach of contract against Defendant NERCO. They allege that NERCO breached the terms of the SANS Treaties. A "breach of contract" is a failure to perform for which a legal excuse is lacking. Realty Developing Co. v. Wakefield Ready-Mixed Concrete Co., 100 N.E.2d 28, 30 (Mass. 1951); 11 Williston, Contract § 1290 (3d ed. 1968). To succeed as to this claim, Plaintiffs must prove by a preponderance of the evidence that a contract existed between themselves and the Defendants, and that Defendants breached the terms of that contract. The essentials of a contract action are the parties' agreement supported by valid consideration, plaintiff's readiness, willingness and ability to perform, defendant's breach preventing performance and damage to the plaintiff. Singarella v. City of Boston, 173 N.E.2d. 290, 291 (Mass. 1961).

Plaintiff's have alleged, in addition, that Defendants violated §§ 1962(a)-(c) of the Racketeer Influenced and Corrupt Organizations Act, (RICO), 18 U.S.C. § 1961 et seq. (1991) by engaging in a "pattern of racketeering" with respect to Graham Watson, which they allege is a RICO "enterprise." They allege that the Defendants' racketeering activity involved the "predicate acts" of mail and wire fraud in violation of 18 U.S.C. §

1341 (mail fraud) and 18 U.S.C. § 1343 (wire fraud), and that such frauds injured the Plaintiffs.

> Section 1962(a) of RICO provides in pertinent part that
>
> > It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of any unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to invest, directly or indirectly, any part of such income, or the proceeds of such income, in the acquisition of any enterprise which is engaged in, or the establishment or operation of, any enterprise which is engaged in, or the activities which affect, interstate or foreign commerce.
>
> Section 1962(b) provides that
>
> > It shall be unlawful for any person through a pattern of racketeering activity or through collection of any unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

Section 1962(c) provides that

> It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

Accordingly, if they are to prevail on their civil RICO count, Plaintiffs must prove, by a preponderance of the evidence, Liquid Air Corp. v. Rogers, 834 F.2d 1297, 1303 (7th Cir. 1987), both the existence of an "enterprise" and a connected "pattern of racketeering activity." United States v. Turkette, 452 U.S. 576, 583 (1981). To prove that an "enterprise" existed, they must present evidence of an ongoing organization, formal or informal, and evidence that various associates functioned as a continuing unit. Id. To prove a "pattern of racketeering activity," Plaintiffs must establish the occurrence of at least two "predicate acts," show that the predicates were related, and that they pose a threat of continued criminal activity. McEvoy Travel Bureau, Inc. v. Heritage Travel, Inc., 904 F.2d 786, 788 (1st Cir. 1990) (citing H.J. Inc. v. Northwestern Bell Telephone Co., 492 U.S. 229, 250 (1989)). Section 1961(1) defines "racketeering activity" as constituting certain state and federal crimes. These crimes are the "predicate acts" which Plaintiffs must establish.

The "predicate acts" which the Plaintiffs allege were part of a pattern of racketeering activity are mail and wire fraud. Therefore, to show a pattern of racketeering activity, Plaintiffs must prove either mail or wire fraud. To prevail on their RICO claim with respect to mail fraud, Plaintiffs must prove that Defendants intentionally participated in a scheme to defraud the Plaintiffs, and used the mails in order to execute that scheme. Pereira v. United States, 347 U.S. 1, 8 (1954). To prevail on their RICO claim with respect to wire fraud, Plaintiffs must prove that Defendants participated in a fraudulent scheme which was furthered by the use of interstate transmission facilities. United States v. Corey, 566 F.2d 429, 430, n.2 (2d Cir. 1977).

Finally, Plaintiffs have alleged that Defendants violated Mass. Gen. L. ch. 93A, § 2 (1990). That Section provides in pertinent part that

> Unfair methods of competition and unfair or deceptive acts or practices in the conduct of trade or commerce are hereby declared unlawful.

Section 11 grants a right of action under Chapter 93A to businesses engaged in disputes with other businesses. Mass. Gen. L. ch. 93A, § 11.

In order to establish a violation of Chapter 93A, the Plaintiffs must show that the action of the Defendants fell "within at least the penumbra of some common-law, statutory, or other established concept of unfairness, or were immoral, unethical, oppressive or unscrupulous and

resulted in substantial injury to . . . other businessmen." Quaker State Oil Refining Corporation v. Garrity Oil Company, 884 F.2d 1510, 1513 (1st Cir. 1989) (citing PMP Associates, Inc. v. Globe Newspaper Company, 321 N.E.2d 915, 917 (Mass. 1975); accord. Pepsi-Cola Metro Bottling Co. v. Checkers, Inc., 754 F.2d 10, 17-18 (1st Cir. 1985) In the context of business-to-business disputes under Section 11, the courts have additionally employed the so-called "rascality standard" which states that "the objectionable conduct must attain a level of rascality that would raise an eyebrow of someone inured to the rough and tumble world of commerce." Id. (citing Levings v. Forbes & Wallace, Inc., 396 N.E.2d 149, 153 (Mass. 1979)); see also, Anthony's Pier Four, Inc. v. HBC Associates, 583 N.E.2d 806, 822 (Mass. 1992) (recognizing that in cases between sophisticated business people, a claimant needs to show a greater level of "rascality" on the part of the defendant than would a less sophisticated party).

Chapter 93A cases have proven to be extremely fact-specific. Thus the specific circumstances surrounding an allegation under 93A "must be sized up one by one." Dolinger v. Brown, 489 N.E.2d 1036, 1039 (Mass. App. Ct. 1986).

The fundamental material term in the SANS Treaties is the term "facultative" underwriting. The parties to the contract understood the meaning of that term in its standard and traditional sense, namely, underwriting on a risk-by-risk certificate basis, the classic meaning of the term. NERCO contracted under the SANS Treaties that Graham Watson would examine each individual risk

submission by the ceding company on a risk-by-risk basis and, if the risk be accepted, Graham Watson would then issue an individual certificate to the ceding company. In fact, NERCO assumed its SANS Treaties' business by the "automatic" and/or "semi-automatic" method of underwriting, whereby Graham Watson delegated its reinsurance underwriting authority to the source company to automatically cede risks to the SANS Treaties. This constituted a material breach of the terms of the contract. The breach of this most material element of the contract by NERCO was intentional, deliberate and planned.[6]

In addition, the Plaintiff reinsurers were induced to enter into the SANS Treaties with NERCO on the

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[6]NERCO also breached its contractual obligation to produce property and casualty facultative assumed business, for under the "automatic" and/or "semi-automatic" method of underwriting the reinsurance business is actually produced by the ceding source companies and not by the original reinsurer.

NERCO also violated its contractual obligation to "co-reinsure for 10 percent participation on all 'System Business' ceded hereunder," as required by Warranty No. 2 in the Slip. Furthermore, although NERCO did not violate its contractual obligation under Warranty No. 1 in the Slip, it is to be noted that neither did it comply with its "understanding" with the lead Plaintiff Reinsurer underwriter that the other 50 percent of the business not ceded to the SANS treaties would be underwritten by facultative reinsurance underwriters.

representation that Graham Watson would produce and underwrite facultative reinsurance and cede such risks, underwritten on an individual certificate basis, to the SANS Treaties. The Plaintiff reinsurers entered into this contractual relationship in reliance on said representation. However, from the beginning of the negotiations, it was NERCO's plan, not to underwrite risks on an individual risk certificate basis, but rather to underwrite reinsurance by the "automatic" and/or "semi-automatic" method of underwriting.

NERCO knew that the Plaintiff reinsurers understood the meaning of the material term "facultative" in its standard and traditional sense of risk-by-risk certificate underwriting and was well aware that it, itself, was secretly using the term in a special sense without ever disclosing such special meaning to the Plaintiff reinsurers. Even the Defendant NERCO's sub-brokers understood and used the term as meaning individual risk-by-risk certificate underwriting when they placed the SANS Treaties with the Plaintiff reinsurers. NERCO's intention to use the "automatic" and/or "semi-automatic" method of underwriting was not even disclosed to their own sub-brokers.

Thus, the representation that reinsurance underwriting would be individual risk certificate underwriting was knowingly false when made, for it was always NERCO's plan to underwrite risks by the "automatic" and/or "semi-automatic" method of underwriting and NERCO was well aware that the Plaintiff reinsurers understood the term "facultative" in its

traditional and standard meaning of risk-by-risk certificate underwriting.

That the misrepresentation was knowingly made is further shown by the use of the term "facultative," as set forth in the Placing Information, where it is clearly used in its standard sense. This is established by the use of the term "facultative" in reference to the NERFAC facility, an individual risk certificate underwriting facility of NERCO.[7]

NERCO also represented that it would produce "non-system business" from primary, risk-bearing, insurance companies directly; in fact, it produced most of such business from MGAs through intermediaries and from intermediaries themselves, and yet never disclosed these material matters to the Plaintiff reinsurers, as it was required to do.

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[7]The term "facultative" in the Slip, which is related to and provided with the Placing Information, is used with the same meaning as in the Placing Information. The language of the Slip, "Business classified by the Reassured as Property and Casualty Facultative Assumed business produced and underwritten by the Graham Watson division of Cameron & Colby Co., Inc." was understood by the parties to the contract as providing NERCO with a limited discretion in classifying the types of reinsurance and that is this Court's interpretation on the basis of the evidence.

The Plaintiff reinsurers, the retrocessionaires under the SANS Treaties, placed their trust and confidence in the representations of NERCO that Graham Watson would underwrite both "system" and "non-system" reinsurance business on an individual, risk-by-risk, certificate basis and that Graham Watson would produce "non-system" reinsurance business directly from primary insurance companies without the use of intermediaries. These three representations were made by NERCO with the intention of inducing the Plaintiff reinsurers to enter into the SANS Treaties, and, in reliance on said three representations, the Plaintiff reinsurers did enter into the SANS Treaties to their detriment. These three representations of NERCO were knowingly false.

In conclusion, NERCO promised the Plaintiff reinsurers that Graham Watson would produce and underwrite reinsurance business in the same manner as did the direct professional reinsurance writers, such as General Reinsurance Corporation, that is, from similar selected primary insurance sources, by the same direct approach, and by the same individual risk certificate method. By such means the direct professional reinsurance writers were known to produce the highest quality reinsurance business. The contractual promise and the three inducing representations were not kept by NERCO nor did NERCO intend to keep such promises.

Participation in the SANS Treaties resulted in extensive financial losses being suffered by the Plaintiff reinsurers, as well as by the Defendants. In the circumstances of this case, it is not feasible to reasonably calculate damages on the basis of the "benefit of the

bargain" method of damages,[8] and thus the only appropriate remedy is to rescind the SANS Treaties as a matter of equity and to award to the Plaintiff reinsurers the amount of $23,281,936.06, plus simple interest at 12 percent on all balances, for a total amount of $37,501,701.12, which amount of money constitutes the difference between claims paid by the Plaintiff reinsurers less premiums paid to the Plaintiff reinsurers during the tenure of the SANS Treaties.[9] General Electric Company v. Callahan, 294 F.2d 60, 64 (1st Cir. 1961) (availability of remedy at law must be "clear"), cert dismissed, 369 U.S. 832 (1962). Cf. Calvert Fire Ins. Co. v. Unigard Mut. Ins. Co., 526 F. SUPP. 623 (D. Neb. 1980) (granting avoidance of a reinsurance treaty for breach of contract

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[8]In order for the Plaintiffs to establish contract damages it would have been necessary to obtain the financial records of the major direct professional reinsurance companies, such as General Reinsurance Corporation, which financial records are confidential and not accessible to third parties.

[9]The Court finds that the conduct of NERCO constitutes a violation of Chapter 93A, Section 2 of the General Laws of the Commonwealth of Massachusetts; the Court rules, as a matter of law, that Title 18, United States Code, Sections 1961 - 1968 do not apply to the facts of this case on the ground that the Plaintiffs have failed to establish that they suffered an "investment" injury under Section 1962 (a) or an "acquisition" injury under Section 1962(b) or that the three Defendants were separate persons as required under Section 1962(c). However, the Court assumes pendant jurisdiction of the case.

and misrepresentations in connection with the placement of the reinsurance), aff'd, 676 F.2d 707 (8th Cir. 1982).

Parties to a reinsurance contract, such as the SANS Treaties, have been described as partners in a marriage or in a business relationship, owing to each other the highest degree of fidelity. The relationship is founded on the confidence one party places in the integrity of the other. This is especially so when the reinsurers "pass their pen" to the reinsured and fully authorize it to produce and underwrite reinsurance on their behalf. When the reinsured delegates this special trust to third parties, contrary to its contractual obligation and to its pre-contractual promises and without disclosing such delegation to its partners, the reinsured is unfaithful to the union and debases the sanctity of the relationship. In such a situation, the relationship must be annulled.

The Court finds for the Plaintiffs in the amount of $37,501,701.12, plus interest and costs.

SO ORDERED.

EDWARD F. HARRINGTON
United States District Judge

UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

COMPAGNIE DE REASSURANCE D'ILE DE FRANCE, ET AL

JUDGMENT IN A CIVIL CASE

V.

NEW ENGLAND REINSURANCE CORPORATION, ET AL

CASE NUMBER: CA 87-0027-H

___ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

_X_ **Decision by Court.** This action came to trial before the Court. The issues have been tried and a decision has been rendered.

IT IS ORDERED AND ADJUDGED WITH THE DEFENDANTS AND TWO OF THE PLAINTIFFS-POHJOLA INSURANCE COMPANY LTD. AND POHJOLA INSURANCE COMPANY {UK} LIMITED AGREEING TO RESOLVE THE DIFFERENCES BY COMPROMISE AND THE COURT FINDS AGAINST THE CLAIMS OF THE DEFENDANTS.

PURSUANT TO MEMORANDUM AND ORDER ISSUED ON JUNE 7, 1993, THE COURT FINDS FOR THE PLAINTIFFS IN THE AMOUNT OF $37,501,701.12, PLUS INTEREST AND COSTS.

JUDGMENT IS HEREBY ENTERED FOR THE PLAINTIFFS.

SO ORDERED.

30 JUNE 1993
Date

Robert J. Smith, Jr.
Clerk

(By) Deputy Clerk

UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

COMPAGNIE DE REASSURANCE D'ILE DE FRANCE, ET AL., Plaintiff,	) CIVIL) ACTION NO.
v.	) 87-0027-H
NEW ENGLAND REINSURANCE CORPORATION, ET AL., Defendants.	) **JUDGMENT**) **IN A CIVIL**) **CASE**

This action came to trial before the Court. The issues have been tried and a decision has been rendered.

IT IS ORDERED AND ADJUDGED THAT

WITH THE DEFENDANTS AND TWO OF THE PLAINTIFFS (POHJOLA INSURANCE COMPANY LTD. AND POHJOLA INSURANCE COMPANY {UK} LIMITED) AGREEING TO RESOLVE THEIR DIFFERENCES BY COMPROMISE, THE COURT FINDS AGAINST THE CLAIMS OF THE DEFENDANTS.

PURSUANT TO MEMORANDUM AND ORDER ISSUED ON JUNE 7, 1993 THE COURT FINDS FOR

THE PLAINTIFFS AND ENTERS JUDGMENT FOR EACH OF THE PLAINTIFFS IN THE FOLLOWING AMOUNTS (WHICH INCLUDE PREJUDGMENT INTEREST), PLUS POST JUDGMENT INTEREST AND COSTS:

PLAINTIFF	AMOUNT (in dollars)
E.W. PAYNE	
Societa Ass. Ind.	622,253.85
Terra Nova	9,328,644.88
Aurora Participants	
Tower Hill	980,399.82
City International	564,720.83
Fuji	617,318.59
Kemper Re	101,676.48
Lombard Continental	462,986.00
Nippon Europe	617,318.61
English & American	1,182,503.18
Kellett Syndicate	1,029,469.71
Warrilow Syndicate	1,715,603.58
Cassidy Syndicate	400,428.83
JARDINE THOMPSON GRAHAM	
TGI Participants	
Atlantica	67,636.35
De Centrale	568,384.59
General of Berne	236,786.85

Kansa Re	486,475.82
Otso Loss of Profits	500,276.57
Samvirke	481,547.01
Tapiola International	641,164.14
Transatlantica	211,898.27
RVE Schadeversekering	24,884.57
Enterprise - Fennia Mutual	169,150.48
Finnish Marine	595,937.55
Wasa International	236,786.85
Industrial Mutual	1,591,509.58

ANGLO SWISS

Universale	8,267,385.15
Sampo	1,029,167.01
Hanseatica	415,944.21
Industrial Mutual	1,020,026.81
Group Josi	266,241.34
Uni-Storebrand	763,737.34

CARTER BRITO E CUNHA

Imperio Re (UK)	12,498.32
Tapiola International	173,113.17

FIELDING PARTNERS

Tapiola International	306,453.97

Vara Pooli Participants

Kansa General	139,940.44
Tapiola International	132,462.64

DIRECT INSURANCE

Corifrance 2,156,206.68

JUDGMENT IS HEREBY ENTERED FOR THE PLAINTIFFS.

SO ORDERED.

9/21/93
Date

EDWARD F. HARRINGTON
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 93-2338

COMPAGNIE DE REASSURANCE D'ILE DE FRANCE, ET AL.,

Plaintiffs, Appellants,

v.

NEW ENGLAND REINSURANCE CORPORATION, ET AL.,

Defendants, Appellees.

No. 93-2339

COMPAGNIE DE REASSURANCE D'ILE DE FRANCE, ET AL.,

Plaintiffs, Appellees,

v.

NEW ENGLAND REINSURANCE CORPORATION, ET AL.,

Defendants, Appellants.

APPEALS FROM THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MASSACHUSETTS

[Hon. Edward F. Harrington, U.S. District Judge]

Before

Torruella, Chief Judge,

Campbell, Senior Circuit Judge,

and Carter, District Judge.*

Robert S. Frank, Jr. with whom Cynthia T. MacLean, David A. Attisani, Choate, Hall & Stewart, David S. Mortensen and Tedeschi, Grasso & Mortensen were on brief for defendants.

Allan B. Taylor, with whom William Shields, Kenneth W. Ritt, Matthew E. Winter, Mary Theresa Kaloupek and Day, Berry & Howard were on brief for plaintiffs.

June 19, 1995

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*Of the District of Maine, sitting by designation.

CAMPBELL, Senior Circuit Judge. This is an appeal from a final judgment of the district court in an action brought by a number of foreign reinsurance syndicates, companies and pools against a domestic reinsurance company and related parties. At issue are reinsurance contracts (or "treaties," as they are known) under which plaintiffs, Compagnie De Reassurance D'Ile de France, et al.,[1] agreed to reinsure portions of risks selected, and also reinsured, by defendant New England Reinsurance Corp. ("NERCO"). After sustaining heavy losses under these Treaties, plaintiffs sued defendants NERCO, First State Insurance Company ("First State"), and Cameron and Colby Co., Inc. ("Cameron & Colby"), alleging that they had been induced to enter into the reinsurance treaties by fraud, and further claiming breach of contract, violations of Mass. Gen. L. Ch. 93A, § 2, and violations of the Racketeer Influenced and Corrupt Organizations Act

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[1]The plaintiffs are listed in the district court's opinion. See Compagnie de Reassurance D'Ile de France v. New England Reinsurance Corp., 825 F. Supp. 370, 373 n.2 (D. Mass. 1993). Plaintiffs Pohjola Insurance Company Ltd. and Pohjola Insurance Company (UK) Limited were dismissed on motion of the defendants, with the consent of the plaintiffs during the trial, and the parties entered a Stipulation of Dismissal dated May 5, 1995, whereby plaintiff De Centrale Herzverzekering N.V. dismissed its appeal in No. 93-2338, and the defendants dismissed their appeal in No. 93-2339 against De Centrale only, leaving 31 plaintiffs remaining.

("RICO"), 18 U.S.C. §§ 1961-1968. Defendants counterclaimed, alleging breach of contract and violations of Mass. Gen. L. oh. 93A, § 2. Following a 30-day bench trial, the district court found for the plaintiffs on all but the RICO claims. The court ordered rescission of the challenged reinsurance Treaties and ordered defendants to pay plaintiffs $38,118,940.07, representing all sums plaintiffs had previously paid out on losses incurred under the Treaties with credit for premiums received, plus prejudgment interest at 12 percent. Defendants estimate that the net cost to them of the court's decision, adding together the court's judgment and the sums plaintiffs have been excused from paying out as reinsurers of various losses, is approximately $106 million.

Defendants have appealed from the judgments for plaintiffs on the fraud, contract and Mass. Gen. L. ch. 93A claims. Plaintiffs have cross-appealed from the district court's dismissal of their RICO claim. For the reasons set forth below, we sustain the district court's findings and rulings on certain matters; reverse others as being clearly erroneous or legally incorrect; and identify still others that require the district court to make findings and rulings now absent. We, therefore, vacate the district court's judgments and remand for further proceedings consistent herewith. Our specific dispositions are summarized on pages 98-100 of this opinion.

I. Background

The following is an overview. More specific facts will be related as needed in our discussion of the various issues.

The defendants are all subsidiaries of the Hartford Group of Insurance Companies ("the Hartford").[2] First State, based in Boston, Massachusetts, was a primary insurer. NERCO was a Boston-based reinsurer. Cameron & Colby, also based in Boston, provided management, marketing, underwriting, and other services to both First State and NERCO. Neither First State nor NERCO had employees of its own; their businesses were carried on by employees of Cameron & Colby. Graham Watson, Inc.,[3] not a party, was created in 1979 as an unincorporated division of Cameron & Colby; it became the latter's wholly owned subsidiary in mid-1980. Graham Watson's role was to provide

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[2] The relationship between these defendants and their corporate parents, the Hartford and ITT, is described in the district court's opinion, 825 F. Supp. at 373. Neither the Hartford nor ITT is a party to this case.

[3] This entity is variously referred to as "Graham-Watson" and "Graham Watson" in the documents contained in the record. Like the district court, we will use the unhyphenated form, unless quoting directly a source using the hyphenated form.

marketing and underwriting services in the facultative[4] reinsurance venture that is the subject of this litigation.

The underlying casualty and property risks germane to this case were located in North America. Individuals and entities wishing to insure against these risks procured policies of insurance from primary insurers. The latter then purchased reinsurance from NERCO in order to indemnify themselves in whole or in part against losses sustained under the primary policies they had issued.

Not wanting to keep all the exposure that it had assumed as a reinsurer, NERCO itself -- often acting with and through Graham Watson -- sought reinsurance on the London insurance market, resulting in the arrangements with which this lawsuit is concerned. Under these reinsuring agreements -- the so-called System and Non-System ("SANS") Treaties -- many syndicates at Lloyd's of London and other overseas reinsurance entities (some of whom are the plaintiffs in this case) agreed to provide continuing reinsurance to

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[4] Facultative reinsurance is one of the two major types of reinsurance, the other being treaty reinsurance. From the Latin word for "ability" or "power," "facultative," broadly speaking, connotes the option to reinsure, or not, each particular risk, as contrasted with a binding arrangement to reinsure all risks of a particular sort. See infra. A major issue in this case is whether the reinsurance provided by defendants was "facultative", as promised in the SANS Treaties.

NERCO on a portion of each risk it reinsured. In industry terminology, NERCO, having been "ceded" the risks by the primary insurers, became a "retrocedent," the plaintiffs became "retrocessionaires," and the agreements between them were "retrocessional" treaties. The plaintiff retrocessionaires agreed to indemnify NERCO for a portion of any losses NERCO might sustain in its reinsurance of primary insurers. In return, NERCO promised to acquire ("produce"), evaluate ("underwrite"), and price ("rate") the risks and to share with plaintiff retrocessionaires, subject to its retention of certain commissions, a portion of the premium it received.

A. Signing the Treaties

In 1979, NERCO retained a U.S. broker, G.L. Hodson, to assist it in arranging for this reinsurance on the London market. Towards this end, Graves Hewitt, the CEO of Cameron & Colby, and his associates drafted and circulated in late 1979 a document known as the Placing Information. This document stated that Cameron & Colby had established the Graham Watson division after studying facultative reinsurance operations in North America and after receiving the

approval and support of the Hartford and ITT.[5] The stated purpose of the division was:

> 1. To participate in the property and casualty facultative reinsurance business which is currently dominated by the direct writers.
>
> 2. To rationalise [sic] the facultative placements of both the Hartford and the First State not only from an administration [sic] point of view but also to provide the retrocessionaire

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[5] Plaintiffs' fraud claims rely significantly on representations made in the Placing Information, especially those pertaining to Graham Watson's intention to procure nonbrokered, "direct" business from "selected primary companies" rather than brokers. We attach as an appendix a copy of the Placing Information typically circulated to the plaintiffs.

s with a broad cross section of facultative reinsurance emanating from these two companies.

According to the Placing Information, Graham Watson was charged with penetrating the "non-brokered . . . direct professional reinsurance market," leaving "[f]acultative reinsurance emanating from reinsurance intermediaries . . . [to] continue to be written separately through NERFAC," the latter being an existing in-house entity that had, for some time, been writing reinsurance for the defendants. The Placing Information was circulated to, among others, several European sub-brokers retained by Hodson to act on NERCO's behalf in seeking potential retrocessionaires.[6]

In late 1979, Hewitt traveled to London accompanied by Thomas Hearn, a Hodson employee. Aided by employees of sub-broker Sedgwick Payne, they approached Ralph Bailey, the head underwriter for plaintiff Terra Nova Insurance Company Limited, and described to him the proposed reinsurance plan.

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[6] These included Sedgwick Payne, North American Reinsurance Brokers Ltd.; Anglo-Swiss Reinsurance Brokers, Ltd.; Carter Brito E Cunha Ltd.; Fielding & Partners; and Jardine Thompson Graham Ltd. None of the sub-brokers are parties to this suit.

Sedgwick Payne's brokers thereafter negotiated with Bailey the "slips" spelling out the terms of the treaties. With Bailey agreeing to act as "lead underwriter" for the London market companies, the brokers approached Ron Kellet, head underwriter for plaintiff B.P.D. Kellet & Others, a Lloyd's syndicate, with the request that he act as lead underwriter on behalf of all other Lloyd's syndicates.[7] After the leads had stamped and initialed the slips, indicating the proportion of the total risk they were bound to accept, the slips were separately presented for approval to the underwriters for each of

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[7] A lead underwriter is initially responsible for negotiating the terms of reinsurance contracts such as the SANS Treaties. The lead underwriter normally commits his or her firm or syndicate to a level of participation in a treaty that is somewhat higher than that of other participating reinsurers, who are referred to as the "following market." Members of the following market rely on the underwriting skill and judgment of the lead as an important factor when deciding whether and by how much to commit themselves on reinsurance obligations. Thus, having a reputable underwriter as lead can have a significant effect on the ability to fully place a retrocessional treaty. There were actually two lead underwriters in this case: Bailey for the London market companies and Kellett for the Lloyd's syndicates. See Edinburgh Assur. Co. v. R.L. Burns Corp., 479 F. Supp. 138, 145 n.2 (C.D. Cal. 1979) ("The market sometimes recognizes both a lead underwriter at Lloyd's and a lead company underwriter."), aff'd in relevant part, 669 F.2d 1259 (9th Cir. 1982).

the plaintiffs,[8] each of whom indicated his or her acceptance of a portion of the risks by initialing the slip.[9]

These slips constituted, in abbreviated form, the contracts between the cedent NERCO and the various retrocessionaires.[10] Briefly summarized, the slips provided that the subject matter of the Treaties was "Business classified by the Reassured [NERCO] as Property and Casualty Facultative Assumed business produced and underwritten by the Graham Watson division of Cameron & Colby Co., Inc." They also stated that the Lead Underwriter had authority to require

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[8] Not all of the 31 plaintiffs participated in all four years of the SANS Treaties. (28 of the plaintiffs participated in the 1980 SANS Treaties; 29 participated in 1981; 27 participated in 1982; and 15 participated in 1983.) However, the process of stamping and initialing the slips to indicate acceptance of a portion of the risk was repeated in each of the following three years (1981-83) with respect to each individual plaintiff. We also note that the plaintiffs were not the only retrocessionaires participating in the SANS Treaties; in all, approximately 100 separate entities accepted portions of these risks over the four years in question.

[9] For a detailed discussion of the business practices of the London insurance market, see Edinburgh Assur., 479 F. Supp. at 144-46.

[10] We place in the appendix portions of one of the typical slips utilized here.

exclusion of certain types of risks, and to agree to the final wording of the formal contract. NERCO was to retain a minimum of $250,000 of each risk ceded, and as respects system business (i.e., risks written by First State and other Hartford entities, infra), was not to cede more than 50 percent of the original reinsurance limit of any given risk to the Treaties, and was to co-reinsure for 10 percent participation on each such risk. The slips also specified the commission structure and various other conditions of the Treaties. The slips did not incorporate the Placing Information as such.

Each underwriter subsequently signed Treaty Wordings, formal contracts containing a more elaborate statement of the parties' agreements. These were based on the slips, and the parties agreed that, in the event of any inconsistency, the slips would control. The first set of SANS Treaties ran for the eleven month period from February 1 through December 31, 1980. Thereafter, those plaintiffs who desired to continue for another year indicated their willingness to join by initialing new slips and ultimately executing new Treaty Wordings for 1981. Successive Treaties were entered into for 1982 and for 1983. Some of the plaintiffs entered into Treaties for each of the four years; others were parties to the Treaties for only one, two, or three of those years. The Treaties were open to renegotiation each year, and certain changes, e.g., relating to commission structure and the like, were in fact made.

For each Treaty year there were actually two slips prepared, one for property business and one for casualty business. The business covered by each slip

was further divided into "system business" and "non-system business." "System business" denoted risks written by member companies of the Hartford, and included, among others, First State and the Hartford itself. "Non-system business" referred to risks written by any other primary insurer. As a condition of participation, although not included in the written contracts, Bailey insisted that no non-system business be ceded to the SANS Treaties for the first year. He testified in his deposition that this was because he felt that the system business was "the steadier, better part of the portfolio."

B. **Performance of the Treaties**

Once the Treaties were fully placed for the 1980 treaty year, NERCO began retroceding to the plaintiffs portions of the risks it was reinsuring. Central to the plaintiffs' present complaint, and to the district court's finding of liability, are the source and nature of NERCO's business as ceded to them. In the first year, over 95 percent of the business so ceded was system business. However, few, if any, of the risks reinsured were from Hartford companies other than First State. In the ensuing three years, the proportion of system business declined in favor of non-system business to less than 50 percent. There was evidence that defendants had hoped that system business would grow and that NERCO and its retrocessionaires would obtain more reinsurance business directly from the other Hartford companies, in addition to First State, but that these hopes were not realized.

The proportion of non-system business rose steadily after the first year, but the non-system business was of a kind which plaintiffs contend, and the district court found, was different from that represented in the Placing Information. The court construed the Placing Information as representing "that Graham Watson would produce 'non-system' reinsurance business directly from primary insurance companies without the use of intermediaries." In support of the court's construction, plaintiffs point to representations in the Placing Information that Graham Watson did not intend to seek reinsurance "on a wholesale basis from all and sundry" but rather to develop a close working relationship "with selected primary companies." The Placing Information stated that nonbrokered business "placed significantly with the direct professional reinsurance market" characterized over 80 percent of United States facultative reinsurance. The Placing Information also stated that Graham Watson was "charged with the responsibility of penetrating this business." Notwithstanding these announced intentions in the Placing Information, most of defendants' growing non-system business after the end of 1980 was, in fact, obtained from intermediaries -- to wit, brokers and Managing General Agents ("MGAs"). MGAs serve as agents of primary insurance carriers with authority to underwrite and place certain business on the insurers' behalf. Defendants received the majority of their non-system business, portions of which were then ceded to the plaintiffs under the SANS Treaties, from Baccala & Shoop Insurance Services, an MGA representing a variety of primary insurance companies. Baccala &

Shoop worked closely with the broker, G.L. Hodson; in fact, they were owned by the same entity.

1. **Semi-Automatic and Automatic Facilities**

Another key issue in the present litigation stems from the fact that, during the annual periods covered by the Treaties, almost all of the non-system business that defendants produced, and shared with the plaintiffs, was underwritten using what are called "semi-automatic facilities." (A "facility" is an agreement setting out, among other things, the rules under which a reinsurer will reinsure risks ceded by the other party.) Defendants insist that semi-automatic facilities were perfectly consistent with the representations in the slips and Treaties that the reinsurance to be ceded to plaintiffs would be "business classified by the Reassured [NERCO] as Property and Casualty Facultative Assumed business." (Emphasis supplied.) Plaintiffs sharply dispute this. Calling facultative underwriting the "fundamental material term in the SANS Treaties," the district court agreed with plaintiffs that the term "facultative" included only reinsurance that a reinsurer underwrites and negotiates with the primary insurer on a risk-by-risk individual certificate basis in advance, i.e., a certificate of reinsurance is issued for each risk after the reinsurer has first looked into and approved reinsuring that particular risk.

Under the semi-automatic method that defendants mostly used in underwriting non-system risks, defendants' underwriters did not evaluate risks one

at a time in advance of the issuance of a policy of reinsurance on each risk. Instead, in contracts called "Master Facultative Certificates" ("MFCs") NERCO agreed with an MGA, broker, or primary insurer that the latter entity could issue reinsurance upon risks of described types, and upon certain conditions and with certain limits, prior to defendants' underwriters' scrutiny and approval of the risk. After the reinsurance attached to each risk, however, the agent or ceding company would send to Graham Watson a "risk bordereau" -- a document identifying and providing a summary of information as to that, and any other, risks reinsured within the reporting period. Graham Watson then had a brief period after receipt of the bordereau, for example 72 hours, within which to cancel the reinsurance on a particular risk if it so desired, cancellation to take effect within a specified period, say, 14 days.

Defendants contend, and presented evidence at trial, that the semi-automatic facility is commonly classified in the industry today as a form of facultative reinsurance. They concede that, in an earlier era, "facultative" was a term applied only to reinsurance individually underwritten on a risk-by-risk basis in advance of binding. But while accepting that the reinsurer's right to reject individual risks remains a general feature of facultative reinsurance, defendants contend that this feature is adequately preserved in the more economical and streamlined semi-automatic facility.[11]

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[11] Because of the cedent's right of cancellation, and the reinsured's right not to cede, defendants and their experts

Defendants also used, in a few instances, a variation known as an "automatic facility." Under this type of facility, rather than having the right to cancel an individual risk, the reinsurer has the right to cancel the entire facility on very short notice. Even without the right to cancel a particular risk, defendants argue that this was "facultative," since the reinsured would, as a practical matter, agree to cancel individual risks rather than face cancellation of the entire facility. Moreover, the reinsured retained the freedom to cede or not to cede a particular risk, which is not the case in treaty reinsurance. Automatics comprised only a small portion of the non-system business, most of which was underwritten using semi-automatics.

2. **The First State Business**

With regard to system business (which was almost exclusively with First State), the defendants did not use a risk bordereau, nor did they ever enter into a

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contend that the semi-automatic facility is a form of facultative reinsurance, and is not forbidden "treaty" reinsurance. The SANS Treaties contained an express exclusion for "assumed treaty" business. In "treaty" reinsurance, the reinsurance arises solely as the consequence of the terms of a prior general contract, with no right on the reinsurer's part to reject a particular risk that meets the terms of the contract, and without any right on the reinsured's part to decline to cede a particular risk, always assuming that the risk in question conforms to the terms of the prior contract.

formal contractual arrangement spelling out First State's and NERCO's relationship in respect to the latter's reinsuring of risks later assigned under the SANS Treaties. There was evidence, however, indicating how matters worked in practice. In practice, First State's underwriters had the power initially to commit NERCO and the SANS Treaty signatories to the reinsuring of individual risks primarily insured by First State. The reinsurance was evidenced by a layoff sheet that First State prepared; each layoff sheet identified a First State risk that NERCO and the Treaty signatories were to reinsure, and provided a brief summary of information about that risk. A packet containing many of these layoff sheets was periodically provided by First State to Graham Watson, whose underwriter could study the risks and would have the right to cancel the reinsurance at will.

Defendants contend that this method was "facultative" because each risk was individually evaluated in due course by a Graham Watson underwriter based on the information provided on the layoff sheets -- and by follow-up phone and face-to-face inquiries, as well as by means of microfiches which reproduced First State's entire underwriting file for a risk, and were available upon request -- and it was understood that the reinsurance was subject to cancellation at will by Graham Watson. They point out that because First State's and Graham Watson's employees were under the same roof and answerable to the same bosses, the latter's underwriters could informally influence First State not to cede business the latter did not wish, as further evidence of their

facultative control. Notwithstanding the absence of a written understanding between Graham Watson and First State, the district court found, after hearing the evidence, that, "Graham Watson underwrote all "'system business' . . . by the 'automatic' and/or 'semi-automatic' method of underwriting." Since practically all system business was with First State, this finding grouped that underwriting with the explicit semi-automatic and automatic facilities used in non-system business.

3. **Further Performance**

At trial, plaintiffs made much of the absence of proof of particular occasions when defendants had ever actually rejected a risk listed in a bordereau or layoff sheet. Plaintiffs also sharply questioned whether the information in the bordereaux and layoff sheets was sufficient to allow for adequate underwriting (evaluation) of individual risks. Defendants responded by emphasizing that, whether or not used, the right to reject at all times existed, and by pointing to evidence that its underwriters adequately reviewed the risks and had other means -- personal inquiries, telephone calls, inspection of First State files, and so on -- to make inquiry in doubtful cases. Defendants' evidence also indicated that Graham Watson conducted periodic audits of the underwriting practices of MGAs and others in order to assess compliance with the terms of the various facilities. The district court found no evidence that defendants had rejected any risks and found that Graham Watson's underwriting of individual risks was inadequate.

In any case, while defendants wrote some small percentage of reinsurance under the SANS Treaties that was facultative in the traditional sense of advance risk-by-risk underwriting, most of the reinsurance produced under the SANS Treaties was underwritten either under some variety of the semi-automatic facility or, in the case of First State system business, under the informal in-house procedures previously described. And, as mentioned above, over the four years of the SANS Treaties, one MGA, Baccala & Shoop, furnished almost all of the non-system business to defendants. Non-system business was found by the court to constitute approximately one-half of the treaty business during the four year period.

The agreement with Ralph Bailey to avoid non-system business for the first year was not to the liking of Graham Watson, whose employees felt that non-system business would be a steadier source of income for the Treaties. Bailey also made known his dislike of MGAs and his reluctance to allow MGA business to be ceded to the SANS Treaties. Bailey testified that, because MGAs did not themselves bear any risk, they did not underwrite as carefully as did underwriters on the payrolls of the primary companies, and hence the business produced through them was of a lower quality.[12] Again, this was not to the liking of Graham

[12] Conflicting points of view were expressed by insurance experts at trial about the relative effectiveness of MGA underwriting, as filtered through semi-automatic facilities, and risk-by-risk underwriting on a "direct" basis.

Watson; one internal memorandum, dated December 11, 1980, stated that "Ralph Bailey has an aversion to MGAs and he will have to be approached rather delicately because a good deal of the business going into this facility will be on business which is designed to provide a real flow of business from a single source." This memorandum also noted that Tom Hearn, of Hodson, would travel to London on December 15, 1980 to attempt to overcome this aversion. Responding to repeated requests from Graham Watson employees, Bailey agreed at some time during the first year to begin allowing non-system business to be ceded to the Treaties. While he expressly agreed to the cession of certain MGA business during the first year (from an MGA known as the London Agency), he did so only with great reluctance. However, he did not request or insert an exclusion for MGA business in the slips or Treaty Wordings for subsequent years, as he could have done. No such express exclusion was ever inserted.

4. **Renewal of the Treaties**

The SANS Treaties were continuous contracts subject to cancellation "upon 120 days prior written notice at December 31, 1980 or any subsequent

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Defendants offered evidence that the losses sustained under the SANS Treaties were less than those suffered by the reinsurance industry as a whole during the same period. Plaintiffs did not attempt to disprove this but rather insisted that the defendants never provided the type of reinsurance business they had promised.

December 31st." This allowed any desired adjustments to be made in the terms of the Treaties on a yearly basis. In practice, all of the retrocessionaires cancelled during the 120-day period preceding December 31, 1980 and then initialed new slips for the next calendar year. In order to induce renewal, Graham Watson, again through Hodson and the European sub-brokers, disseminated a document referred to as the 1981 Anniversary Information. In addition to listing losses in excess of $50,000 reported through September 30, 1980, and providing a summary of the business ceded thus far, the Anniversary Information included the following statements:

> To date, the preponderance of the business has been assumed from First State Insurance Company and written on a pro rata basis. Non-System business represents a relatively small proportion of the total and what has been written is limited to Casualty business on an excess of loss basis emanating from Baccala and Shoop Insurance Services.

> Because of the competitive climate in the United States, Non-System business will develop more slowly than originally anticipated. It continues to be the posture of Graham-Watson not to seek business on a wholesale basis but rather to develop close working relationship [sic] with selected primary sources.

On March 23, 1981, a meeting was held in Boston to discuss the performance of the SANS Treaties. In attendance were Ralph Bailey and several employees of Hodson and Graham Watson. One major topic of conversation was the inclusion of MGA business. Bailey asked the Graham Watson underwriters for their opinion of Baccala & Shoop, and was told by Bob Wright, the property underwriter, that Wright knew most of Baccala & Shoop's home office people and was comfortable with them. Later in the meeting, however, Bailey stated that he would not consider any new MGA business for the facility. He did not, however, make this a contractual requirement by inserting an exclusion for MGA business in the slip at the next renewal.

At the close of the second year, a 1982 Anniversary Information was disseminated, which again provided a list of losses and a summary of the business. This document also included figures as to overall loss experience through September 30, 1981, which disclosed that the SANS Treaties were losing money. Indeed, the loss ratio for the 1980 Treaties was an alarming 248.65 percent.[13] In addition, the 1982 Anniversary Information included the following statements:

> The rating basis of these treaties is being amended with effect from 1st January 1982 to more accurately reflect the basis used by Graham-Watson. All business other than that assumed from the First State which is a "system" company is being written on a net rated basis in that Graham-Watson is quoting their price and

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[13] Loss ratio is the ratio of net earned premium to incurred losses. A loss ratio under 100% indicates a profitable treaty; a loss ratio greater than 100% indicates that more money is being paid to satisfy claims than is being made in the form of premiums.

> if a ceding commission is required by the original company, this is then added to the premium required by Graham-Watson. . .
>
> The current sources of business is [sic] as follows:-
> FIRST STATE INS. CO.
> TWIN CITY per Baccala and Shoop
> Insurance Services
> ST. PAUL FIRE & MARINE
> NORTHBROOK
> CRUM & FORSTER
> CNA
> ROYAL INS. CO.
> CHUBB AND SON
> AETNA CASUALTY & SURETY

Plaintiffs point out defendants' failure to mention, other than in the case of Twin City, that certain of the listed primary insurers acted through Baccala & Shoop or other intermediary.

It appears that no formal anniversary information was prepared for 1983, the last year of the SANS Treaties, although letters were sent to the retrocessionaires containing a list of losses, a summary of the business, and notification of various changes that

had been made over the past year, none of which are material here. However, the retrocessionaires were told that the treaties were "continuing for 1983 basically as before."

Following the placing of the SANS Treaties, the plaintiffs at first accepted their shares of the premiums and paid their shares of corresponding losses incurred by NERCO. The losses were considerable, as they were throughout the insurance industry at this time. Beginning as early as the fourth quarter of 1982, however, certain of the plaintiffs ceased paying losses.[14] There was evidence that some of the plaintiffs (in addition to Terra Nova, through Bailey, as related above) began to inquire as early as 1982 about the use of MGAs to obtain business (rather than through the formation of direct relationships with primary insurers), and about the underwriting methods used by the defendants.

C. The Present Lawsuit

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[14] The district court made no findings as to when each individual plaintiff first refused to make payments on losses incurred. The plaintiffs introduced evidence which showed the last quarter in which each plaintiff made a payment to the Defendants. The earliest was Kansa Reinsurance, which made its last payment in the fourth quarter of 1982; the latest were nine plaintiffs including Uni Storebrand, Sampo, and the seven companies bound through Aurora Underwriters, all of whom made their last payments some time in the fourth quarter of 1986.

In 1985, some of the plaintiffs retained counsel and sought to conduct a preliminary inspection of NERCO's books pursuant to a provision in the Treaty Wordings allowing a right of inspection "at all reasonable times for the purpose of obtaining information concerning this contract or the subject matter thereof." NERCO allowed a seven day preliminary inspection in the fall of 1985, but a dispute then arose between the parties concerning the conditions under which any further inspection was to be conducted.

Evidently dissatisfied with the results of this inspection, and concerned about the growing loss ratios of the SANS Treaties, a group of sixteen plaintiffs (of whom seven are no longer parties) commenced this action against NERCO on January 6, 1987. They alleged that they had a contractual right under the treaties to inspect NERCO's records, and that although they had previously conducted a seven day inspection, a further, more exhaustive evaluation was needed. They sought an order compelling a new inspection. On February 13, 1987, the parties entered a voluntary stipulation allowing, and establishing procedures for, a further inspection to be conducted by Roy T. Ward and four of his employees. On February 27, 1987, the district court entered an order allowing the inspection to continue pursuant to that stipulation.

Meanwhile, in late 1986 a second group of reinsurers that had continued to pay losses to NERCO while the parties discussed the possibility of a

commutation[15] retained a reinsurance inspection firm, Palange & Associates, to inspect NERCO's books and records. The inspection was conducted in Boston in 1987. Again, disputes arose as to the scope and methods of this inspection; however, no court action was required to resolve these disputes, and Mr. Palange completed his inspection in the spring of 1988.

Following these inspections, on July 12, 1988, the original plaintiffs, now joined by the remainder of the present plaintiffs, moved to amend their complaint. The new complaint omitted the substantive allegations of the original complaint, and deleted the plaintiffs' request that the treaties be enforced. Instead, the plaintiffs asserted that the treaties had been induced by fraud and should be rescinded. They also asserted claims for breach of contract, violation of Mass. Gen. L. ch. 93A, § 2, and the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961-1968. Denying these allegations, defendants asserted the statute of limitations as a defense and counterclaimed for recovery under the challenged treaties, and for treble damages, costs and attorneys fees under Mass. Gen. L. ch. 93A, § 2.

Prior to trial the defendants moved for summary judgment on the statute of limitations issue, as well as

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[15] A commutation is a method of terminating a reinsurer's obligation to pay future claims in return for a lump sum payment. It does not necessarily involve any claim or admission of wrongdoing by the reinsured.

on a variety of other grounds not important here. The district court held a hearing on the matter on January 15, 1992. In a written order dated January 16, 1992, the court denied summary judgment on the statute of limitations ground, with no explanation.

A jury-waived trial began on April 5, 1993. The statute of limitations was raised again during trial. The court delayed ruling until it could "find out what the facts were." On the twenty-second day of trial, the judge stated simply that "[i]t seems that there is no problem with Statute of Limitations." However, the court appeared to entertain the issue again two days later, accepting a deposition into evidence after defendants argued it was relevant to the statute of limitations.

The trial concluded on May 19, 1993, and the district court entered a memorandum and order on June 7, 1993. See 825 F. Supp. 370 (D. Mass. 1993). The court held that the defendants had induced the plaintiffs to enter into the treaties by means of fraudulent misrepresentations, had breached their contracts with plaintiffs, and had engaged in unfair and deceptive trade practices in violation of Mass. Gen. L. ch. 93A. The RICO count was rejected. The court made no mention of defendants' statute of limitations defenses.[16]

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[16] The district court also made no specific resolution in its judgment of defendants' counterclaims. It can be implied, however, as defendants state in their brief, that the court dismissed the counterclaims "sub silentio." The counterclaims sought to hold plaintiffs liable for their

By way of relief, the district court ordered rescission of the challenged reinsurance contracts and ordered defendants to repay to plaintiffs all sums plaintiffs had previously paid out on losses incurred under those contracts with credit for premiums paid to the plaintiffs, plus prejudgment interest at 12 percent. Judgment was entered for the plaintiffs in June 30, 1993 in the amount of $37,501,701.12 plus postjudgment interest and costs. Following several motions to amend this judgment, a new judgment was entered on September 21, 1993 in the amount of $38,118,940.07, which listed the amount due to each individual plaintiff, as opposed to the lump sum stated in the first judgment. The defendants' filed their notice of appeal from the

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unperformed reinsurance obligations imposed by the treaties. While it would have been better practice for the court to have denied the counterclaims expressly, its intent to do so is apparent from its rescission of the treaties as having been induced by defendants' fraud and breached by defendants' actions. We have held, in parallel circumstances, that such elliptical judgments will be deemed to adjudicate all claims for Rule 54(b) purposes notwithstanding their failure to deal specifically with the counterclaims in question. Joseph E. Bennett Co. v. Trio Indus., Inc., 306 F.2d 546, 548 (1st Cir. 1962); see Fed. R. Civ. P. 54(b); 28 U.S.C. § 1291. By the same token, we hold that defendants, having acted reasonably by focussing their appeal on the district court's findings of liability, did not forfeit the right to seek relief under their counterclaims by not expressly appealing from the district court's unspecified dismissal of those counterclaims.

fraud, contract, and ch. 93A claims on October 19, 1993; the plaintiffs' filed their notice of appeal from the adverse RICO finding on November 2, 1993. Motions relating to the plaintiffs' requests for attorney's fees and costs are still pending in the district court.

D. The District Court's Findings

In its memorandum and order of June 7, 1993, the district court found that the defendants made, and the plaintiffs relied upon, "four material representations" to secure the plaintiff"'s participation in the SANS Treaties. These were:

> 1. That Graham Watson would produce and underwrite property and casualty facultative reinsurance. This representation mean[t] that Graham Watson would underwrite reinsurance on an individual, risk-by-risk, certificate basis.
> 2. That Graham Watson would produce such reinsurance directly from system and non-system original insurers without the use of any intermediaries. This representation mean[t]

that Graham Watson would be a direct writer of reinsurance from the original insurer, which reinsurance cessions would not be brokered.

3. That the Hartford Companies, along with First State, would be the "system business" original insurers. This representation mean[t] that the Hartford Insurance Group would be the source of "system business." The Hartford Insurance Group is made up of the so-called Hartford Companies and First State, an excess and surplus line carrier.

4. That Graham Watson would seek facultative reinsurance business from selected primary companies, rather than on a wholesale basis. This representation mean[t] that Graham Watson would assume reinsurance from

> selected insurance companies, not reinsurance companies or Managing General Agents, that is, from risk-bearing insurance entities.

825 F. Supp. at 376-77 (emphasis in original). The district court found that although business had been assumed from several of the Hartford Companies, including First State, Hartford Specialty Company, Nutmeg Insurance Company, and Twin City Insurance Company, all of this business with the exception of the First State business had been classified as non-system business. The court listed, as sources of non-system business, a number of primary insurance companies, but also a number of brokers and MGAs, and found that "[t]he majority of 'non-system business' emanated from Baccala and Shoop, a Managing General Agent, through the intermediary G.L. Hodson." Id. After a further discussion of Graham Watson's underwriting practices, the court stated:

> Upon a review of the evidence, the Court finds that Graham Watson did not facultatively underwrite, that is, underwrite on an individual risk certificate basis as represented, any of the "system business" nor virtually any of the "non-system business"; Graham Watson underwrote all "system business" and virtually all "non-system

> business" by the "automatic" and/or "semi-automatic" method of underwriting.
>
> The Court also finds, on the basis of the evidence, that most of the "non-system business" emanated from MGAs through the use of intermediaries and from intermediaries themselves, and was not produced from primary risk-bearing insurance entities directly. Although the plaintiff reinsurers were aware that Baccala and Shoop, an MGA, had ceded to the SANS Treaties approximately five percent of the total business during the first year, 1980, they were never apprised that, during the ensuing three years, Baccala and Shoop would cede the majority of "non-system business" and that other MGAs and intermediaries would cede, in conjunction with Baccala and Shoop, most of the "non-system business" to the SANS Treaties. "Non-system business" constituted, over the course of the SANS Treaties, approximately one-half of the total business ceded to the Treaties.

825 F. Supp. at 379 (emphasis in original).

With respect to the plaintiffs' fraud claims, the district court stated that the plaintiffs understood that the term "facultative," as used in the SANS Treaties, was

being used in its "standard and traditional sense, namely, underwriting on a risk-by-risk certificate basis." It found that NERCO was aware of this understanding on the plaintiffs' part, "and was well aware that it, itself, was secretly using the term in a special sense without ever disclosing such special meaning" to the plaintiffs, and that this was therefore a knowing misrepresentation. As to the breach of contract claims, the district court found that NERCO did not keep, and never intended to keep, its contractual promise to underwrite risks obtained directly from selected primary sources on an individual risk-by-risk certificate basis.

II. Preliminary Matters

A. Standard of Appellate Review

When reviewing the findings of a district court sitting without a jury, "'the court of appeals cannot undertake to decide factual issues afresh.'" Jackson v. Harvard Univ., 900 F.2d 464, 466 (1st Cir. 1990) (quoting Reliance Steel Prod. Co. v. National Fire Ins. Co., 880 F.2d 575, 576 (1st Cir. 1989)), cert. denied, 498 U.S. 848 (1990). We may set aside findings of fact by the district court, whether based on oral or documentary evidence, only if "clearly erroneous," and with due regard "to the opportunity of the trial court to judge of the credibility of witnesses." Fed. R. Civ. P. 52(a). A finding is clearly erroneous when, "'although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.'" See Anderson v. City of Bessemer City, 470 U.S. 564, 573

(1985) (quoting United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948)), reh'g denied, 333 U.S. 869); accord Brown Daltas & Assoc., Inc. v. General Accident Ins. Co. of Am., 48 F.3d 30, 36 (1st Cir. 1995).

Review of legal rulings is, however, de novo. "[I]f the trial court bases its findings upon a mistaken impression of applicable legal principles, the reviewing court is not bound by the clearly erroneous standard." Inwood Lab., Inc. v. Ives Lab., Inc., 456 U.S. 844, 855 n.15 (1982) (citing United States v. Singer Mfg. Co., 374 U.S. 174, 194 n.9 (1963)); accord Cumpiano v. Banco Santander Puerto Rico, 902 F.2d 148, 153 (1st Cir. 1990). "[T]o the extent that findings of fact can be shown to have been predicated upon, or induced by, errors of law, they will be accorded diminished respect on appeal." Dedham Water Co., Inc. v. Cumberland Farms Dairy, Inc., 972 F.2d 453, 457 (1st Cir. 1992) (citing RCI Northeast Servs. Div. v. Boston Edison Co., 822 F.2d 199, 203 (1st Cir. 1987))

Application of these principles is complicated in the present case by the district court's disregard, in several key areas, of Rule 52(a) 's further injunction that, "[i]n all actions tried upon the facts without a jury . . . , the court shall find the facts specially and state separately its conclusions of law thereon." Fed. R. Civ. P. 52(a). Rule 52 (a) imposes on the district court "an obligation to ensure that its ratio decidendi is set forth with enough clarity to enable a reviewing court reliably to perform its function." Touch v. Master Unit Die Products, Inc., 43 F.3d 754, 759 (1st Cir. 1995). The court made no findings and rulings whatsoever on the

important statute of limitations issues discussed infra, nor, in general, did it make subsidiary findings resolving disputed evidence. Thus in finding that defendants had committed fraud in promising "facultative" reinsurance, the court stated that all parties understood that term to mean risk-by-risk, individual certificate underwriting, but made no attempt to distinguish or explain the great body of evidence indicating a broader meaning. Its finding that all plaintiffs relied on the Placing Information is similarly bereft of explanation as to how this could be, given the absence of proof of reliance in a number of instances.

These omissions have required us to remand for certain additional findings. Where possible, however, we have disposed of key issues or, if that was impossible, have set out a guiding legal standard for use on remand. In sum, we have endeavored to dispose of as much of the appeals as we properly can at this juncture.

B. **Choice of Law**

We dispose first of certain contentions raised with regard to legal standards. Plaintiffs challenge defendants' assertion that the SANS Treaties contain an express choice of law provision providing for the application of Massachusetts law to plaintiffs' common law fraud and contract claims. In fact, Article XVIII of the SANS Treaties merely provides that if a dispute is litigated, plaintiffs will submit to the jurisdiction of any court of competent jurisdiction in the United States, and "all matters hereunder shall be determined in accordance with the law and practice of such court." But while

plaintiffs' point is well taken, they go on to concede that "[i]n this case, Massachusetts choice of law principles dictate the application of Massachusetts substantive law to plaintiffs' common law claims." Given the parties' (and the lower court's) general acceptance of Massachusetts law, albeit on different theories, and in the absence of a preferable choice, we shall apply Massachusetts law except as otherwise noted. See Bird v. Centennial Ins. Co., 11 F.3d 228, 231 n.5 (1st Cir. 1993) (accepting parties' agreed choice of law where there was a "reasonable relation" between the litigation and the forum whose law had been selected)

C. The Burden Required to Prove Fraud

The defendants argue strenuously, and the district court stated, that the plaintiffs were required to prove fraud by "clear and convincing evidence." The plaintiffs respond that under applicable Massachusetts law fraud need not be shown by anything more than the ordinary preponderance of the evidence standard applicable to civil cases in general. Review of Massachusetts law indicates that the plaintiffs are right.[17]

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[17] Defendants also argue that, because the plaintiffs adopted "clear and convincing evidence" as the applicable burden of proof in the district court, and did not object when defense counsel stated their burden in those terms, it is now too late for them to contest the burden of proof. However, while parties may stipulate to the facts (and perhaps even to the law, in different circumstances), they

In Callahan v. Westinghouse Broadcasting Co., Inc., 372 Mass. 582, 363 N.E.2d 240 (Mass. 1977), the Massachusetts Supreme Judicial Court ("SJC") commented on the burden of proof applicable to a libel action governed by Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974) and New York Times Co. v. Sullivan, 376 U.S. 254 (1964). Recognizing that the Supreme Court required "clear and convincing proof" in a libel case, the SJC nonetheless noted that,

> the words "clear and convincing proof" had not been discussed in our cases [other than in the libel context] because the phrase had not been used theretofore in this Commonwealth. Indeed, because of the vagueness of an intermediate standard of proof, we have not looked with favor on the use of such a standard.

Callahan, 372 Mass. at 583, 363 N.E.2d at 241. We have not found any Massachusetts case stating that a "clear and convincing" standard should be applied in a common law fraud case, nor have we found any indication that the SJC has, since Callahan, looked with greater favor on introducing a "clear and convincing" standard of proof to cases where none otherwise exists. See Paul J. Liacos, Handbook of Massachusetts

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may not, by agreement or by some principal of acquiescence or waiver, compel courts to follow a clear and convincing standard that is contrary to the governing law.

Evidence 38-39 (5th ed. 1981) (stating that the burden of proof in Massachusetts civil cases is "by a preponderance of the evidence" and listing those few issues, not including fraud, where a higher standard is required, including proof of a gift causa mortis, contents of a lost will, irregularity of official proceedings, and malice in a defamation action) ; see also 9 John Henry Wigmore, Evidence in Trials at Common Law § 2498 (Chadbourn rev. 1981) (noting that "clear and convincing" standard is commonly applied in cases of fraud, but failing to cite, in a comprehensive list of authorities, any Massachusetts case applying this standard). We conclude, therefore, that Massachusetts has not adopted a "clear and convincing" standard in cases of fraud.

D. The Duty Owed to the Reinsurers

The plaintiffs argue, and the district court found, that the defendants were under a duty to the plaintiffs of utmost good faith ("uberrimae fidei"). The defendants refer to the same standard. We agree that a reinsurer like NERCO, having obtained by treaty the power to impose significant risks and liabilities upon plaintiff retrocessionaires, owed to them the utmost good faith in its dealings under the treaties. See generally Unigard Sec. Ins. Co., Inc. v. North River Ins. Co., 4 F.3d 1049 (2d Cir. 1993).

This means that, as the district court properly recognized, defendants owed plaintiffs a duty "to exercise good faith and to disclose all material facts." In the non-marine context, however, a claim of fraud may

not be founded on innocent misrepresentation and concealment. Thus, the district court properly required the plaintiff to prove that

> the defendant made a false representation of a material fact with knowledge of its falsity for the purpose of inducing the plaintiff to act thereon, and that the plaintiff relied upon the representation as true and acted upon it to his damage.

Kennedy v. Josephthal & Co., Inc., 814 F.2d 798, 805 (1st Cir. 1987) (quoting Danca v. Taunton Sav. Bank, 385 Mass. 1, 8, 429 N.E.2d 1129, 1133 (1982) (citations omitted)).

The standard for fraudulent concealment is similar:

> Except with respect to marine risks, concealment exists and avoids the policy where the insured has knowledge of a fact material to the risk which honesty, good faith, and fair dealing require that he should communicate to the insurer but which he designedly and intentionally withholds.

9 George J. Couch, Cyclopedia of Insurance Law § 38:2 (2nd ed. 1985) (Couch) . Massachusetts' adherence to the same rule is indicated in Century Indem. Co. v. Jameson, 333 Mass. 503, 504- 05, 131 N.E.2d 767, 769

(Mass. 1956); see also Unigard, 4 F.3d at 1069 (holding that simple negligence in not disclosing a material fact does not constitute bad faith so as to avoid a policy of reinsurance).

III. The Fraud Claims

We turn now to the substantive issues, and, initially, to the fraud claim which is pivotal to all the district court's findings. The district court saw two fundamental issues in the case, both of them relevant to its finding of fraud. One was "whether Graham Watson did underwrite facultative reinsurance" on the system and non- system business. The other was "whether Graham Watson produced 'non-system business' by establishing direct relationships with primary, risk-bearing, insurance companies."

A. "Facultative" Underwriting

Plaintiffs argued, and the district court found, that "the parties to the contract" (including, it would seem, defendants themselves) "understood the meaning of that term ["facultative"] in its standard and traditional sense, namely, underwriting on a risk-by-risk certificate basis, the classic meaning of the term." 825 F. Supp. at 382. According to the court, "NERCO knew" that plaintiffs understood "'facultative' in its standard and traditional sense of risk-by-risk certificate underwriting and was well aware that it, itself, was secretly using the term in a special sense without ever disclosing such special meaning to the Plaintiff reinsurers." Thus, the court concluded, the defendants' representation that the

business would be underwritten on a risk-by-risk individual certificate basis was "knowingly false when made." Id.

1. **No Express Misrepresentation**

We hold that these findings are clearly erroneous insofar as they attribute to defendants an implicit or express representation that they would engage exclusively in classic risk-by-risk, individual certificate underwriting. The record is without evidence from which a court could find that defendants represented to plaintiffs that the facultative business underwritten by Graham Watson would be limited to individual certificate, risk-by-risk underwriting.

To be sure, as the court found, there was evidence that the overseas sub-brokers engaged to represent defendants by their broker, G.L. Hodson, understood "facultative" in the classic risk-by-risk individual certificate sense. Nigel Huntington-Whitely, the employee principally assigned to the SANS Treaty placements by defendants' sub-broker, Sedgwick Payne, testified to having this understanding. But he indicated that it "may have just been an assumption," and could not identify the source of his understanding beyond his sense of what the term "facultative" might mean. It was not established that the sub-brokers were told this by defendants nor that prior to the initial (1980) Treaties the sub-brokers communicated this view to plaintiffs or to defendants during negotiations.

To fill this gap, plaintiffs point to Huntington-Whitely's letter of June 24, 1981 (well over a year after the Treaties were entered into), wherein he states in passing that "Graham Watson is underwriting each risk individually." However, this statement clearly did not induce the plaintiffs to enter into the 1980 and 1981 SANS Treaties, given its timing. Moreover, it is arguable that the semi-automatic facilities, because they allowed Graham Watson's underwriters to reject individual risks, were a form of individual risk underwriting and thus not necessarily inconsistent with this statement.

Plaintiffs also point to the 1982 Anniversary Information, which states that, on non-system business, "Graham Watson is quoting their price and if a ceding commission is required by the original company, this is then added to the premium required by Graham Watson." Plaintiffs argue that this specifically describes individual risk negotiation. However, it could just as easily be read to refer to Graham Watson quoting a price during the initial negotiations leading to the formation of a semi-automatic facility. Thus, it is not an explicit promise to perform individual risk-by-risk certificate underwriting. Moreover, this representation, like the statement in Huntington-Whitely's letter, was made in 1981, and thus could not have fraudulently induced the plaintiffs to participate in the 1980 and 1981 SANS Treaties.

Defendants' chief executive, Graves Hewitt, testified at the trial to having told one of the lead underwriters, Bailey, in 1979, about his dissatisfaction

with the method of using a separate certificate as to each risk, and his intention, in connection with the SANS Treaties, to use a single controlling facility for multiple risks, as was later done by means of the semi-automatic MFCs. Because the district court found -- contrary to Hewitt's testimony -- that defendants had not disclosed their intent to use semi-automatics, we must assume that it did not credit that testimony, although nowhere in its findings did the court mention and reject the testimony. We do not, in any case, rely upon Hewitt's testimony in determining that the court's fraud findings premised on the term "facultative" were erroneous.

Bailey himself did not attend the trial but was deposed and his deposition was read. He did not describe a meeting with Hewitt in 1979 nor any specific representations having been made to him prior to the execution of the Treaties on the character of the facultative underwriting. He testified generally to "understanding" that Graham Watson would assess and underwrite each risk separately, but did not refer to any conversation or occasion where any defendant so promised. Asked if he would have considered semi-automatic binding authorities to be facultative underwriting, he said that "is not what I had intended and not what I had been told from my own recollection." This was the closest he came to suggesting that he was told by someone (defendants, brokers, or others?) that facultative meant what the judge found. We think this vague testimony, which makes no reference to specific sources, falls short of supporting a finding that defendants expressly promised to engage in risk-by-risk

underwriting only or knew that plaintiffs misunderstood their intentions in this regard.

2. **The Intended Meaning of the Term "Facultative"**

We similarly hold clearly erroneous the finding that defendants "knew" that plaintiffs understood "facultative" to be limited to risk-by-risk certificate underwriting. There is no evidence of statements or correspondence by plaintiffs or their representatives to defendants, prior to execution of the slips and treaties, informing defendants that the plaintiffs understood the meaning of facultative to be so limited.

Of course, if the court properly could have found, on the basis of the evidence, that the term "facultative" was unambiguous, referring only to individual certificate, risk-by-risk underwriting, then defendants would be charged with knowledge of that ordinary meaning. However, as the evidence clearly showed, that term, both standing alone and as used in the Placing Information, slips, and Treaty Wordings, encompasses a variety of underwriting methods, about the propriety of which the parties and their experts disagree. Whether or not a term as used by parties to a contract is ambiguous is a question of law subject to plenary review. ITT Corp. v. LTX Corp., 926 F.2d 1258, 1261 (1st Cir. 1991) (citations omitted); see also In re Navigation Technology Corp., 880 F.2d 1491, 1495 (1st Cir. 1989) ("Contractual language is considered ambiguous where the contracting parties reasonably differ as to its meaning."). However, where a term is

ambiguous, its meaning presents a question of fact, see Commercial Union Ins. Co. v. Boston Edison Co., 412 Mass. 545, 557, 591 N.E.2d 165, 172 (1992) (citations omitted), a finding on which may only be reversed if clearly erroneous. Fed. R. Civ. P. 52(a).

As noted, the district court found that the parties understood the meaning of the term "facultative" in its "standard and traditional sense, namely, underwriting on a risk-by-risk certificate basis." If by this finding, and others like it, the district court meant that the term was legally unambiguous, being limited in meaning to only that one type of underwriting, it was wrong as a matter of law. Expert testimony and treatises presented by both sides support the view that the term, as used in the industry today, has been broadened beyond its classic roots, notwithstanding plaintiffs' insistence that the classic method is alone the proper one.

Most likely the court did not mean the term was unambiguous as a matter of law, but rather concluded, on the basis of all the evidence, that, as used in the present circumstances, it should be given the limited meaning ascribed.[18] Yet the district court offered no

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[18] "When the written agreement, as applied to the subject matter, is in any respect uncertain or equivocal in meaning, all the circumstances of the parties leading to its execution may be shown for the purpose of elucidating, but not of contradicting or changing its terms." Affiliated FM Ins. Co. v. Constitution Reins. Corp., 416 Mass. 839, 842, 626 N.E.2d 878, 880 (1994) (quoting Keating v. Stadium Management Corp., 24 Mass. App. Ct. 246, 249,

reasons why it gave the term the limited reading it did. Nor did it explain why it believed defendants "knew" that plaintiffs so restricted the term. On the latter point, it may have been influenced by testimony from defendants' principal, Graves Hewitt, who said he had as good an understanding of the London insurance market as any American. The judge may have felt that, possessing such insight, Hewitt "knew" that, as some English witnesses testified, "facultative" would be understood to mean risk-by-risk certificate underwriting in that market. But absent evidence that Hewitt actually knew and believed this, such a leap would be pure speculation given Hewitt's own contrary testimony.

Moreover, English treatises introduced into evidence by plaintiffs indicate that, notwithstanding plaintiffs' witnesses, the reinsurance industry in England recognizes types of facultative reinsurance other than the risk-by-risk certificate variety. A leading English writer on reinsurance, Golding, describes in his authoritative treatise (introduced by plaintiffs) various types of facultative reinsurance other than the risk-by-risk certificate variety. One variation Golding describes is the so-called "cover in course of post." He states:

> It will be clear that much of the labor involved in the facultative method is connected with getting the necessary

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508 N.E.2d 121 (1987) (quoting Robert Indus., Inc. v. Spence, 362 Mass. 751, 753-54, 291 N.E.2d 407 (1973)), review denied, 400 Mass. 1104, 511 N.E.2d 620 (1987)

initials on the slips. In modern practice this can be largely avoided by the system of what may be called giving cover "in course of post" -- though the term nowadays extends to the use of telex communications as much as to the mail. The reinsured will arrange facilities with a number of reinsurers, whereby it may issue request notes by post, for one or more lines of a risk to be reinsured, as may be agreed. The reinsurers will then hold covered each up to the amount of its agreed share and remains so bound, unless and until it has signified its declinature "in course of post". As a rule a limit is fixed, within which this must be notified say 48 hours after receipt, though sometimes this is extended up to as much as a fortnight to allow for possible delays in transmission. If no declinature is made within the period, the reinsurer is bound in the ordinary way. The system does save a great deal of work, and is much favored by reinsureds accordingly. Yet it may be emphasized that it still remains facultative reinsurance, for the reinsurer is in no way deprived of its power to decline, even though it must accept responsibility in the meantime.

C.E. Golding, Golding: The Law and Practice of Reinsurance 42 (K.V. Louw ed., 5th ed. 1987)

(emphasis supplied); see also R.L. Carter, Reinsurance 234-35 (2nd ed. 1983) (detailing use of bordereau to report risks bound under the "cover in course of post" method, which he also classifies as facultative).[19]

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[19] Golding also states:

> The subject of facultative reinsurance w[ould] not be complete without some reference to the form of reinsurance called a "facultative obligatory" or "open cover," which is generally regarded as belonging to the facultative section of the business and is often so treated in the books of a reinsurer.
>
> An open cover is a reinsurance arrangement under which the reinsured may at its option cede a share of certain defined risks, which share the reinsurer is bound obligatorily to accept. Such an arrangement thus partakes partly of the nature of a facultative reinsurance and partly of a treaty. To the reinsured it is facultative because cessions are optional at its discretion. . . . To the reinsurer the open cover is more in the nature of a treaty. The obligation is an obligatory one and it applies not to an individual case but to all cases of a given class that may be ceded. No matter how the open cover may be regarded in a reinsurer's books, it is clear that it has none of the

But even ignoring these indications that English custom and practice have gone beyond classic facultative methodology, it is the American, not the English, usage that seems to us key. The underwriters in London and Europe contracted in the slips with defendant NERCO, an American company, for reinsurance "classified by the Reassured [NERCO] as Property and Casualty Facultative Assumed Business produced and underwritten by the Graham Watson division of Cameron & Colby, Inc." (Emphasis supplied.)[20] The facultative reinsurance NERCO was to

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> characteristics of a facultative reinsurance and in particular it lacks the fundamental feature, the power, inherent in a facultative reinsurer, to decline a risk if though fit.

Golding, supra, at 46-47. The open cover, as Golding describes it, seems somewhat similar to the automatic facility, except that under the open cover, the reinsurer lacks the ability to cancel the contract on short notice, as it may under the automatic. As the somewhat anomalous open cover is "generally regarded" as facultative, so much more might the automatic facility be so regarded, since it explicitly includes a right to reject risks by rejecting the entire facility. Automatics were, in any event, a minor part of defendants' business, semi-automatics having been the predominant mode.

[20] At footnote 7 of its opinion, the court stated that this language

classify covered risks in the American, not the English, market. NERCO was expressly delegated the right to

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> was understood by the parties to the contract as providing NERCO with a limited discretion in classifying the types of reinsurance and that is this Court's interpretation on the basis of the evidence.

It is unclear precisely what the court had in mind by this statement. There was testimony that the contract language meant that NERCO had discretion to classify a particular risk as either a property or a casualty risk; there was other testimony that it was standard language which gave NERCO discretion to determine what business was facultative. The plain meaning of the language seems to us to allow NERCO reasonable, though not unlimited, discretion to decide what types of reinsurance fit within the stated classification -- namely, as "Property and Casualty Facultative Assumed business . . ." Determining whether the business was "facultative" as well as whether it was "property" or "casualty" would all be included. See Commercial Union, 7 F.3d at 1052 (citing Jiminez v. Peninsular & Oriental Steam Navigation Co., 974 F.2d 221, 223 (1st Cir. 1992); Feinberg v. Insurance Co. of N. Am., 260 F.2d 523, 527 (1st Cir. 1958)) ("In construing a contract, we must give reasonable effect to all terms whenever possible."); id. at 1052-53 (citing Liberty Mut. Ins. Co. v. Gibbs, 773 F.2d 15, 17 (1st Cir. 1985) (where unambiguous, contract terms must be given their plain meaning).

"classify" the reinsurance. See supra note 24. In exercising that right, NERCO was, of course, held to a standard of reasonable classification. Salem Glass Co. v. Joseph Rugo, Inc., 343 Mass. 103, 106, 176 N.E.2d 30, 32-33 (1961) (where a contract leaves a certain discretion or power in the hands of one party, that party is under a duty to exercise that power reasonably); accord Johnson v. Educational Testing Serv., 754 F.2d 20, 26 (1st Cir. 1985), cert. denied, 472 U.S. 1029 (1985). Nonetheless, being an American company operating here, NERCO would obviously be expected to classify its business pursuant to American, not English, terminology. Hence, to the extent there is any difference between the prevailing English and American views of what kind of underwriting the market regards as "facultative," the parties would have intended the American interpretation to control, absent evidence of some contrary intent. Cf. Hazard's Adm'r. v. New England Marine Ins. Co., 33 U.S. 557, 564 (1834) ("Underwriters are presumed to know the usages and customs of all of the places from or to which they make insurances.").

To be sure, plaintiffs' experts gave testimony tending to show that the American market understood the term "facultative reinsurance" to mean risk-by-risk certificate underwriting. One might argue that the district judge was entitled to believe plaintiffs' experts over defendants' (who testified to the opposite understanding),[21] and to infer that the ordinary meaning

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[21] Defendants' experts testified that "facultative" included reinsurance underwritten by the semi-automatic

of the term "facultative" was, therefore, the traditional one of risk-by-risk certificate underwriting.

But the evidence that the term "facultative," within the American market, embraces more than just the individual risk certificate method is simply too extensive for the court to have rejected. Normally, of course, we are bound by the district court's choice among competing experts. But it is hard to gainsay experts such as defendants' expert James Inzerillo, see supra note 23, when even plaintiffs' experts did not categorically deny the widespread use, within the facultative operations of American reinsurers, of facilities like the semi-automatics and automatics here in issue. Plaintiffs' experts did not, in fact, testify that the ordinary meaning of the term in the American reinsurance industry was limited to individual certificate risk-by-risk underwriting. Rather they intimated that this

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and related methods. One of defendants' experts was James Inzerillo, the former president of Munich American Reinsurance Co., the United States branch of Munich Insurance Co., the largest reinsurer in the world. He testified that individual risk underwriting was "by no means" the only form of facultative reinsurance, and that MFCs and semi-automatic and automatic facilities were all forms of facultative reinsurance. Moreover, he testified that the largest direct-writing professional reinsurers in the country all used such facilities in their facultative operations. None of plaintiffs/experts categorically denied the widespread use of such facilities in facultative operations.

was what, in their own opinion, the term properly meant or should mean. Yet, the question is not the abstract use of language but whether NERCO having discretion under the slips and Treaty Wordings could reasonably classify the semi-automatic and other methods it used in its own operations as "facultative" and whether it committed fraud when it did so.

The best approach to answering this question lies in the realities of industry practice. Cf. Affiliated FM Ins., 416 Mass at 845, 626 N.E.2d at 881 ("Where, as here, the contract language is ambiguous, evidence of trade usage is admissible to determine the meaning of the agreement."). Plaintiffs' expert, Phelan, conceded that American companies commonly used facilities similar to defendants' semi-automatics and automatics within their facultative departments. He regarded this as anomalous, and pointed out practical considerations which had led to that development. But while disapproving, he admitted to the widespread use of facilities of this type within the industry under the facultative designation.[22]

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[22] Phelan testified, on cross-examination:

> Q: Now you said in response to Mr. Ritt's question, if I understood you correctly, that the professional reinsurers in this country in their facultative departments commonly write semiautomatic and automatic facilities and call them facultative; isn't that right?

American treatise writers, moreover, like the English writers from whom we have quoted, acknowledge a substantial, even predominant, modern trend towards use of facultative facilities similar to the semi-automatics here in question.[23] We think it

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A: Yes.
Q: And you have testified, if I understand it, that there is nothing, per se, wrong with doing so; isn't that right?
A: That is correct.

[23] For instance, Langler, writing in America in the 1950's, describes an arrangement very much like the MFCs used by the defendants, which he places squarely in the facultative camp. He says,

> Such facultative business as is now being done by Reinsurance Companies in the main, is transacted under Agreements somewhat similar to the enclosed. The offices ceding the business either prepare binders and/or certificates supplied by the Reinsurer or, if equipped to do so, will furnish reports of the business on an itemized bordereau, ... It is, however, the invariable right of the Reinsurer (or should be) to ask for the cancellation, within 5 days after receipt of advices, of any cession or cessions submitted under the terms of the agreement, otherwise the reinsurance is considered binding on both parties. It should be noted that this

> cancellation privilege is worthless unless itemized reports are received, from which it will be possible to review the cessions and extract one or more for cancellation notice, if desired.

Willian J. Langler, The Business of Reinsurance 103-04 (1954). Langler includes a sample contract for use with this method, which contains the following clause:

> Cancellation Privilege. The Reinsurer binds itself to accept reinsurances ceded to it hereunder with the understanding however that it may cancel any cession or cessions within five days after receipt of advices . . . upon notice to the Ceding Company.

Id. at 106. This clause is not dissimilar to cancellation clauses found in the MFCs used by the defendants to assume business.

The district court quoted from 2 Klaus Gerathewohl et al., Reinsurance Principles and Practice 1 (John Christofer La Bonte trans., 1980) in support of its view that semi-automatic and automatic facilities are not a legitimate form of facultative reinsurance. Gerathewohl does state, as a general proposition, that facultative reinsurance "always covers a single risk." However, he states, in a section entitled "The management of facultative reinsurance business," that "[i]n order to keep

is substantially beyond cavil that, in recent times, the term "facultative reinsurance" includes methods, in

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the direct insurer's management and administration operations for facultative reinsurance business at a minimum, it is essential to rationalize - ie [sic] standardize - all operational processes as far as the individual nature of facultative reinsurance will allow." Id. at 12 (emphasis added). Among the methods used "particularly by large professional reinsurance companies that specialize in the facultative business," id. at 13, is the following:

> Application of General Terms and Conditions of Facultative Reinsurance containing general principles applicable to all cessions made. Such streamlining and standardization of facultative reinsurance agreements avoids the necessity to negotiate the terms and conditions on each individual case and also excludes possible cases of doubt owing to the absence of express stipulations.

Id. at 14-15. Thus, Gerathewohl cannot stand as support for a definition of facultative underwriting that excludes all but individual risk-by-risk negotiation. Moreover, Gerathewohl is a German author, writing for a German reinsurance company. His views, while probably authoritative in that context, cannot be taken as authoritative over those of writers more intimate with the common practices of the American reinsurance market.

addition to traditional risk-by-risk certificate underwriting, similar in concept to the semi-automatics.

Given this body of evidence, including plaintiffs' expert's concession as to the classification, we see no adequate basis, from the term "facultative" itself, for the judge to infer that defendants necessarily knew that plaintiffs would or should interpret "facultative," as used in the slips and Treaty Wordings, as limited solely to risk-by-risk certificate underwriting. While the latter is the original and classic method, see Unigard, 4 F.3d at 1053-54, other "streamlined" forms are clearly now being utilized within the industry under the rubric of "facultative," both here and abroad, including types in which the reinsurer can be bound on individual risks by the reinsured acting pursuant to the terms of a general authorizing contract. Such a contract requires the reinsured to report the placement of the reinsurance to the reinsurer via a bordereau; and it may give the reinsurer the right, within a specified time frame, to reject any particular risk thereafter but not necessarily ab initio. The semi-automatics in issue here were designed along these lines. Facilities employing this method were developed to offset the paperwork and high costs associated with classic certificate facultative reinsurance individually negotiated in advance on a risk-by-risk basis.[24] The hallmark of facultative reinsurance

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[24]The First State reinsurance, as the district court found, fell within the automatic and/or semi-automatic method of underwriting. See supra section I.B.2. The record supports that finding, in the sense that the practices and

evaluation of each risk separately by the reinsurer's underwriter is sought to be preserved by maintaining the right to cancel after the fact. Although a window of exposure is created during which the reinsurer is bound without his consent on what the latter may later decide is an unacceptable risk, the potential for damage is minimized by the relative shortness of the exposure and by contract conditions which prevent the reinsured from binding the reinsurer to predescribed types of risks the reinsurer does not wish to cover.[25]

We conclude that there is insufficient support in the record for the court's key fraud finding that defendants knowingly misrepresented to plaintiffs that

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understanding between First State and Graham Watson were generally analogous to those under the formalized MFCs, although the close employment settings may have indicated greater de facto underwriting control.

[25]The district court found that semi-automatic underwriting differed from the classic risk-by-risk facultative method in that "the 'right to cancel' and the 'right to reject' are effective only at the time the right is exercised by the reinsurance underwriter and well after the reinsured risks had attached to the SANS Treaties." These rights were not effective ab initio. But this appears to be a price the industry has been willing to pay for the streamlined operation, as Golding notes, see Golding, supra, at 42 ("Yet it may be emphasized that it still remains facultative reinsurance, for the reinsurer is in no way deprived of its power to decline, even though it must accept responsibility in the meantime.")

they would receive one type of reinsurance (the classic risk-by-risk certificate form of facultative), while intending all along to provide another type (semi-automatic and automatic). The evidence does, indeed, support the court's finding that defendants intended to supply reinsurance underwritten by the semiautomatic and (to a minor degree) automatic methods (although not to the complete exclusion of classic facultative, a small amount of which was also produced). But the record does not support the finding that the defendants knew that the plaintiffs expected to receive only the classic risk-by-risk certificate form of facultative reinsurance, nor does it support the finding that defendants made knowing misrepresentations with respect to the term "facultative".

3. No Concealment

Before leaving this subject, we shall consider an alternate theory of fraud based on use of the term "facultative," a theory which, arguably, might enable us to uphold the district court's result.

Defendants doubtless knew that the streamlined forms of facultative underwriting they intended to provide under the SANS Treaties were not the same as the traditional form of facultative underwriting. Graves Hewitt's testimony indicated as much. He testified that most of the facultative business in his company's NERFAC division had been underwritten in the classic individual certificate manner. He wanted Graham Watson to switch to the semi-automatic method in order to get rid of the paperwork and expense associated with

the classic method.[26] The record also bears the inference (assuming, as we infer, supra, that the court discredited Hewitt's testimony that he so informed Bailey in 1979) that defendants not only did not inform plaintiffs -- or their own sub-brokers -- of their intention to streamline their underwriting, but kept this information to themselves. Does it follow from this that, while negotiating the SANS Treaties, defendants designedly failed to volunteer to plaintiffs facts material to the risk -- i.e., their intention to use this type of facultative underwriting -- "which honesty, good faith and fair dealing require[d] that [they] should communicate to the insurer"? 9 Couch § 38:2.

Although argued by plaintiffs, the above theory was not adopted by the district court. Instead, the court found that defendants had misled plaintiffs by making

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[26]Hewitt testified that when he approached Bailey in 1979, he did so intending to short circuit the classic facultative arrangements which NERFAC was using because "we had mountains of paper to file . . . . I made it clear to Ralph we were not interested in doing business that way." The court, as it was entitled to, apparently rejected Hewitt's testimony. (If accepted, it would have seriously undermined any theory of intentional misrepresentation.) The testimony at least indicates that Hewitt was well aware that the MFCs and accompanying modes of underwriting were in some sense a departure from past practice. There was evidence of their occasional use by NERFAC in the past, but most of NERFAC's underwriting was by the traditional facultative method.

the "knowingly false" representation that "reinsurance underwriting would be individual risk certificate underwriting." While there is insufficient record support for such an express misrepresentation, it can be argued that defendants, being under the duty to exercise the utmost good faith, Unigard, 4 F.3d at 1066, were required to disclose, as a fact material to the risk, their proposed utilization of streamlined facultative underwriting procedures going beyond the traditional method.

Couch states:

> In effecting a contract of reinsurance, it is incumbent upon the original insurer to communicate to the reinsurer all facts of which it has knowledge which are material to the risk, and where it states as a fact something untrue, with intent to deceive, or where it states a fact positively as true without knowing it to be true, and which tends to mislead, the policy is avoided where such statement or fact materially affects the

> risk; also, any undue concealment or intentional withholding of facts material to the risk, which ought in good conscience to be communicated by the original insurer, avoids the contract, without regard to whether the knowledge or information with respect to material facts was acquired by the original insurer previously or subsequently to the writing of the original contract.

19 Couch § 80:77. While the above speaks of the relationship between original insurer and reinsurer, we think the same general principles apply between a retrocedant and retrocessionares in a reinsurance treaty. The question boils down to whether a failure to disclose plans to deviate from traditional risk-by-risk underwriting, should be considered "undue concealment or intentional withholding of facts material to the risk, which ought in good conscience to be communicated. . . ." Id. We answer in the negative for two reasons.

First, in determining what information is so material as to require disclosure by the insured sua

sponte, courts recognize that the insured need not disclose "what the insurer already knows or ought to know." 9 Couch § 38:15. It is said that "[a] minute disclosure of every material circumstance is not required." Puritan Ins. Co. v. Eagle S.S. Co., S.A., 779 F.2d 866, 871 (2d Cir. 1985).

> Ordinarily the insured is not required to make more than a general statement of facts, and is not expected to go into the details about which the insurer manifests no interest and makes no inquiry . . . .

9 Couch § 38:58. There is a "wide distinction . . . between [the insured's duties in] those cases where there is no inquiry and those where questions are propounded by the insurer." Id.

Here there is no indication that plaintiffs asked defendants during the negotiation of the first SANS Treaties to describe what types of facultative underwriting they proposed to engage in. To the contrary, the executed contracts expressly allowed defendants a reasonable discretion in this regard. And as we have just held, the type of underwriting methods they utilized, while not the classic form of facultative reinsurance, fell within industry parameters.

The parties here were of equal power and highly knowledgeable. The slips and Treaty Wordings were negotiated by and between sophisticated reinsurance professionals. Without first being asked by the other party, one would not expect defendants to volunteer a plethora of details on their proposed underwriting practices. Matters would have been different had defendants affirmatively misrepresented their intended underwriting practices or given incomplete, evasive or incorrect answers to questions asked. We see no basis to infer "undue concealment" from their failure to volunteer further information about facultative underwriting characteristics where, for all that appears, the subject was not broached.

The slips, as said, were worded so as to vest discretion in NERCO as to the business it would classify as "facultative," indicating a willingness to leave this choice to NERCO. As previously discussed, NERCO's choice had to be reasonable and exercised in good faith. Salem Glass, 343 Mass. at 106, 176 N.E.2d at 32-33; Johnson, 754 F.2d at 26. But, within those limits, the decision was left in NERCO's hands. To say that NERCO had a duty to volunteer to plaintiffs, unasked, the nature of its proposed facultative underwriting facilities and, in effect, secure their advance approval, goes beyond the parties' bargain as written. If plaintiffs had wished to limit defendants to a particular facultative method, that requirement should have been inserted in the contract. It was not. The duty of utmost good faith should not enable a party, whose bargain later turns sour, to expand the terms of an original, fairly bargained

contract.[27] Given the equal strength and sophistication of the parties, and the fact that underwriting considerations now in dispute were such obvious topics of inquiry had plaintiffs wanted to know more, we are not convinced that the record establishes that the intended methods of proposed facultative underwriting were material items of the type defendants were required, without inquiry, to disclose.

However, even if the materiality of the information were such that defendants should have volunteered it, the record lacks evidence from which to find that defendants, recognizing its materiality, withheld it deliberately rather than through oversight. Claims in fraud against non-marine reinsurers cannot rest on a showing of mere negligent concealment.

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[27]To argue that the plaintiffs' underwriters were lulled into not asking because they did not understand the American meaning of "facultative" is surely to underestimate the acuity of the London underwriters who write insurance around the world. As already mentioned, English authorities like Golding, supra, indicate that, even in the British market, streamlined methods of facultative underwriting are well known. But assuming different considerations in reinsuring risks in other parts of the world, underwriters are expected to seek information as to the terms and practices in the insured's market if they are interested. Cf. Hazard's Adm'r., 33 U.S. at 564 ("Underwriters are presumed to know the usages and customs of all of the places from or to which they make insurances.").

Unigard, 4 F.3d at 1069. The semi-automatic and like methods employed were, as above indicated, within accepted parameters of facultative classification, and the contract left their use to defendants' discretion. Plans to use such facilities were not so abnormal as to imply fraudulent intent from the mere fact of non-disclosure. Any argument that plans to use semi-automatics had to be disclosed because that method of underwriting was especially risky is belied by the absence of evidence linking the SANS Treaty losses with the method of underwriting used. To the contrary, defendants presented evidence which, if believed, could indicate that the losses under the Treaties were less than the industry averages for the period.[28] It is undisputed, as the judge stated, that the market in which the losses occurred was "disastrous" generally. Substantial contrary evidence was not introduced, nor was there substantial evidence of large Treaty losses from risks of a type that would likely not have been reinsured under the more deliberate classic facultative procedures. We find the record inadequate to support a finding that in failing to disclose their plans to use semi-automatic and related underwriting methods, defendants were acting with fraudulent intent.

We thus reject, as an alternative means of affirming the court's "facultative" fraud finding, the

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[28]Cf. Unigard, 4 F.3d at 1054 (noting that "in recent years, the reinsurance market has witnessed an increase in participants and a decline in profitability due to huge environmental losses")

fraudulent withholding theory above discussed. We conclude that the court clearly erred to the extent it based its finding of fraud on defendants' promise to produce and underwrite "facultative" reinsurance.[29]

B. **Risks Obtained Directly from Primary Insurers**

The district court's fraud determination rests also on findings of misrepresentations in the 1979 Placing Information concerning Graham Watson's intent to obtain reinsurance directly from selected primary insurers without intermediaries. The court found that (1) NERCO represented that it would "produce 'non-system business' from primary, risk-bearing, insurance companies directly"; (2) that "in fact, it produced most of such business from [Managing General Agents] through intermediaries and from intermediaries themselves, and yet never disclosed these material matters to the Plaintiff reinsurers as it was required to do"; (3) that plaintiffs had put their trust and confidence in, and entered into the SANS Treaties in reliance upon, the foregoing representations (as well as upon the supposed representation of individual risk certificate underwriting, rejected above); (4) that the inducing

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[29]For reasons set out in our discussion of the plaintiffs' contract claims, infra, we reject the district court's determination of fraud insofar as based on its finding that defendants did not, in fact, "produce" or "underwrite" the reinsurance, but rather improperly delegated those duties to others.

representations to produce and underwrite reinsurance from selected primary sources, and by a direct approach rather than through intermediaries, "were knowingly false" and "were not kept by NERCO nor did NERCO intend to keep such promises."

Two complementary theories emerge from these findings. First, that defendants never intended, when in 1979 they wrote and circulated the Placing Information containing the challenged representations, to live up to them. Second, that when later, during the course of the Treaties, it became apparent that "direct" non-system business was unavailable, and defendants decided to seek non-system business through intermediaries, they did not disclose "these material matters, as [they were] required to do."

1. **Fraud in the Inducement**

The first theory amounts to fraud in the inducement. While the misrepresentations were of intentions as to a course of action in the future, the deliberate misstatement of present intentions can constitute fraud.

> Present intention as to a future act is a fact. It is susceptible of proof. When such intention does not exist, . . . it is a misrepresentation of a material fact . . . . The statement of fact as to

> present intention of the defendant, being susceptible of actual knowledge and being a fact alleged to have been false, may be made the foundation of an action for deceit.

Feldman v. Witmark, 254 Mass. 480, 481-82, 150 N.E. 329 (1926), quoted in Barret Assoc., Inc. v. Aronson, 346 Mass. 150, 190 N.E.2d 867, 868 (1963). It is true the Placing Information was never incorporated into the contracts (consisting of the slips and Treaty Wordings). But defendants prepared and circulated the Placing Information specifically to induce persons and entities like the plaintiffs to enter into the Treaties. Knowingly false material statements therein inducing reliance would be actionable fraud.[30]

Defendants respond that the representation in the Placing Information of an intention to "develop a close working relationship with selected primary companies" and related statements were accurate reflections of their intentions when made. In support of this, they point to evidence of their efforts after the Treaties were entered into to develop a working relationship with primary companies. They also argue

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[30]Defendants challenge the district court's finding that all plaintiffs relied on these misrepresentations. We discuss reliance in the following section.

that at all times they did have an ongoing direct relationship with First State. Utilizing brokers and MGAs to provide NERCO with reinsurance business was said to have occurred only after it was apparent that these earlier, sincere efforts had failed.

But the court was entitled to find otherwise, as it did. Anderson, 470 U.S. at 573-74 (if evidence is subject to more than one reasonable interpretation, it cannot be clearly erroneous) . Before the Placing Information was written, there was evidence that NERCO commonly used intermediaries. Statements by defendants' witnesses at trial and in certain of defendants' planning documents issued prior to the SANS Treaties suggest an intention to continue to do so in the Graham Watson operation. And defendants' efforts, after the Treaties were in place, to secure non-brokered business could be found to be predictably ineffectual, further suggesting a lack of intention to secure the direct business described in the Placing Information. The Placing Information representations, it might be inferred, more reflected a calculated effort to entice plaintiffs to enter into the Treaties than honestly to project defendants' real business plans. While susceptible of another construction, the record adequately supports the court's finding that representations in the Placing Information as to Graham Watson's direct writing intentions were knowingly misstated.

Defendants argue that even though NERCO may have used intermediaries, it nonetheless complied with its representation that it would develop a close working relationship with primary companies.

Defendants point out that the reinsurance it wrote with the aid of intermediaries came, for the most part, from highly regarded primary insurance companies. They also argue that the intermediaries enabled them to develop relationships with these companies that might, in time, become "direct." But the court, as it did, was entitled to read the Placing Information as inconsistent with the securing of business through brokers and MGAs. The Placing Information says, for example, that "[f]aculative reinsurance emanating from reinsurance intermediaries will continue to be written separately through NERFAC." While defendants seek to place a different meaning on this, the court was entitled to read this as saying that business through intermediaries would not be handled by Graham Watson. And there were other statements supporting the same impression.

The court was entitled to conclude that there were significant differences between a "direct" relationship between NERCO and selected primary insurers and a relationship by brokers and MGAs. These differences could affect the quality of the business, at least in some people's minds, and might have caused some plaintiffs, had they been aware of defendants' actual plans, to reevaluate their decision to participate in the SANS Treaties. In the case of business obtained through MGAs, for instance, the MGA underwrote the risk for the primary insurer (as opposed to the underwriting being performed by the primary insurer itself); communications, premiums, and reporting and accounting documents were routed through the broker. The MGA was not at risk should an actual loss arise. Bailey, a lead underwriter, strenuously objected to

business underwritten by intermediaries, regarding it as of lesser quality. The court was entitled to believe that the non-system business provided through Baccala and Shoop and others was materially different from the business represented in the Placing Information. We, therefore, affirm the district court's finding that material and knowing misrepresentations were made in the Placing Information in 1979.

2. **Concealment**

The court also found that NERCO "never disclosed these material matters to the Plaintiff reinsurers as it was required to do." This appears to be a finding that, while the Treaties were in effect, NERCO violated its good faith duty to disclose to plaintiffs matters coming to its attention material to the risk -- most notably its growing use of intermediaries for non-system business and its abandonment of the plans set out in the Placing Information to establish direct relationships with primary insurers. See Unigard, 4 F.3d at 1069. This trend, however, was not totally unannounced by defendants. In the 1981 Anniversary Information, defendants revealed that, although the preponderance of that year's business was system business from First State, a "relatively small proportion of the non-system business had been written on an excess of loss basis emanating from Baccala and Shoop Insurance Services." At this time, Bailey was already well aware that NERCO was receiving the Baccala and Shoop business. He objected to it, but finally went along for that year. Because Bailey was a lead underwriter, this conceivably (although we do not decide) put all the

plaintiffs for whom he was acting on notice that more such business could be anticipated in the following year, yet neither he nor anyone else took the simple precaution of inserting a prohibition against this type of business in the renewal slips for 1981 and following years.

The district court dismissed the 1981 Anniversary Information disclosure in the following finding:

> Although the Plaintiff reinsurers were aware that Baccala and Shoop, an MGA, had ceded to the SANS Treaties approximately five percent of the total business during the first year, 1980, they were never apprised that, during the ensuing three years, Baccala and Shoop would cede the majority of "non-system business" and that other MGAs and intermediaries would cede, in conjunction with Baccala and Shoop, most of the "non-system business" to the SANS Treaties.

This finding does not explain, however, why Bailey and others, once on notice that business was being accepted that was contrary to representations in the Placing Information, did not continue to protest and try to head off the acceptance of further such business. Moreover, the court made no reference to other evidence that certain of the plaintiffs may have learned a considerable amount about the nature and source of defendant's business during the life of the SANS Treaties. Such evidence is relevant, under discovery principles, to the various statutes of limitations, including the three year fraud statute, infra. It may also be substantively relevant to plaintiffs' fraud claims and the recovery rights of individual plaintiffs. Although we have sustained the district court's finding that defendants deliberately misstated their business plans in 1979, if certain plaintiffs renewed their annual participations in the SANS Treaties even after becoming aware that defendants were using intermediaries and lacked "direct" business, this could affect their right to recover in fraud for subsequent Treaty business, and might conceivably cast doubt as to their right to recover at all, on some theory of acquiescence or waiver. These matters require the making of further findings as to what information became known to whom, and when, and determination of the legal effect of any such knowledge and/or notice.

Therefore, although we affirm the district court's finding that knowing misrepresentations were made in the Placing Information, we direct that reconsideration be given on remand to the legal significance of the information revealed in the 1981

Anniversary Information, and any other information the court finds was subsequently received by the plaintiffs, or some of them, as it relates to plaintiffs' rights to abandon their reinsurance obligations under the SANS Treaties, and recover damages for losses already paid. In considering such matters, the district court should take into account, among other things, defendants' duty of utmost good faith, the identity of those plaintiffs affected by the particular information, the legal effect on plaintiffs of information possessed by Bailey because of his special role as a lead underwriter, and the fact that the Treaties were renewable annually. The district court did not discuss or make findings on these matters. So as to leave a clear field on remand, we vacate (without, however, necessarily disapproving) and leave for further evaluation by the district court, the court's finding that NERCO "never disclosed these material matters to the plaintiff reinsurers, as it was required to do." However, we affirm the district court's finding that the defendants' made material misrepresentations in the Placing Information regarding plans to obtain business directly from primary insurers and related matters.

On remand it will also be necessary for the court to consider exactly which of the SANS Treaties were infected by the misrepresentations made in the Placing Information. This question may be affected not only by which information came to what plaintiffs during the term of the SANS Treaties, but also by the fact that the business produced by First State was obtained directly, without the involvement of any intermediary. No part of that business, therefore, was seemingly affected by these misrepresentations although we do not foreclose the

issue. In addition, because the district court made no subsidiary findings concerning the various arrangements under which Graham Watson assumed non-system business, we cannot tell whether all of that business involved the use of brokers and/or intermediaries, or whether some portion of it was obtained directly from primary insurers. On remand, the district court should take into account all such issues in determining -- assuming the statutes of limitations and other - matters do not stand in the way of recovery -- what relief to provide.

C. Reliance

The district court properly listed reliance as one of the elements of a common law fraud under Massachusetts law. 825 F. Supp. at 380 (stating that plaintiffs must prove that they "relied upon that representation as true and acted upon it to their detriment"). The court then found that the representation that defendants would obtain business directly from primary insurers was "made by NERCO with the intention of inducing the Plaintiff reinsurers to enter into the SANS Treaties, and, in reliance on said . . . representation[], the Plaintiff reinsurers did enter into the SANS Treaties to their detriment." 825 F. Supp. at 383 (emphasis supplied). The court made no subsidiary findings which would indicate what evidence it credited in finding that all of the 32 plaintiffs[31] relied.

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[31]Thirty-two being the number of plaintiffs before the district court at the time it rendered judgment.

Defendants challenge this finding, pointing out that a majority of the plaintiffs failed to present any proof whatsoever that they had individually read and relied upon the Placing Information. Underwriters for only some of the plaintiffs testified that they had relied upon the challenged statements. Plaintiffs conceded in closing argument that for many of the individual plaintiffs there was no specific proof of reliance.

Reliance is an element of common law fraud in Massachusetts, as the district court stated. Danca, 385 Mass. at 8, 429 N.E.2d at 1133 (citations omitted). It is "general insurance law" that reliance is an element of fraud in the insurance context. E.g., Foremost Guar. Corp. v. Meritor Sav. Bank, 910 F.2d 118, 123 (4th Cir. 1990). Plaintiffs nonetheless argued below and on appeal that proof of reliance was not needed, citing Shapiro v. American Home Assur. Co., 584 F. Supp. 1245 (D. Mass. 1984). In Shapiro, the district court said that "[t]he weight of Massachusetts authority does not consider 'reliance' as a separate element which an insurer must prove in order to invalidate an insurance policy." Id. at 1250. But Shapiro, and the cases cited therein, see Pahigian v. Manufacturers' Life Ins. Co., 349 Mass. 78, 206 N.E.2d 660 (1965); Davidson v. Massachusetts Casualty Ins. Co., 325 Mass. 115, 89 N.E.2d 201 (1949); Bouley v. Continental Casualty Co., 454 F.2d 85 (1st Cir. 1972) (applying Connecticut law), are factually distinguishable from the present case. Shapiro and its predecessors dealt with misrepresentations made on a form application for a policy of insurance, which application was then attached to and became a part of the policy. In Shapiro, the

application stated on its face that "any claim or action arising [from an incorrect answer to the previous question in the application] is excluded from this proposed coverage." Shapiro, 584 F. Supp. at 1247. The Shapiro line of cases relate to what have been called "warranties" in insurance law. See 9 Couch, § 36:1 ("Generally speaking, a warranty in the law of insurance is a statement, stipulation, or condition which forms a part of the contract, whereby the insured contracts as to the existence of certain facts, circumstances, or conditions, the literal truth as to which is essential to the validity of the contract.") (emphasis supplied). Warranties are typically enforced regardless of reliance. In the present case, the Placing Information was not a warranty. It was neither incorporated in, nor attached to, the contracts eventually executed, nor did the contracts themselves contain any promise that Graham Watson would obtain business directly from primary insurers. Shapiro, Pahigian, and Davidson were, in addition, all cases decided under Mass. Gen. L. ch. 175, § 186, a consumer protection statute not at issue here, and arguably inapplicable to this situation. Cf. Liberty Mut., 773 F.2d at 18 (refusing to apply Mass. Gen. L. ch. 175, § 112, a consumer protection statute, in the reinsurance context, and noting that a contract of reinsurance is more "a contract of indemnity" than a policy of insurance). Finally, in Shapiro, the court found that even if reliance were a required element of proof under § 186, such reliance would be found on the evidence before the court. Shapiro, 584 F. Supp. at 1249. This obviously cannot be said here of those plaintiffs who did not present individual evidence of reliance, infra. Plaintiffs' counsel conceded in closing

argument that what he called subjective reliance by the underwriter who wrote the risk was not proven here in many instances. We, therefore, find no basis in Shapiro for making an exception here to the Massachusetts requirement that a plaintiff seeking recovery in fraud must prove reliance on the misrepresentations made.

As direct evidence of reliance is admittedly lacking as to many plaintiffs, the question arises whether there may be circumstantial evidence of reliance to fill in the gap. We cannot find such evidence. The plaintiffs were, for the most part, unrelated entities from several European nations. They were approached by no fewer than five sub-brokers. Defendants, it is true, concede in their brief that the SANS "placing materials were distributed by the London sub-brokers to prospective retrocessionaires, including the plaintiffs, in London and Central Europe." But delivery of the placing materials to a plaintiff is not the same as proof that the recipient looked at and relied upon them. Nor is the fact that certain other plaintiffs read and relied upon the placing materials evidence that all plaintiffs did so. Several of the plaintiffs were unable to produce copies of the Placing Information from their own files, and many were unable to present the testimony of anyone who could say that the Placing Information was seen and relied upon in making the decision to enter into the SANS Treaties. There was also evidence that, at least as to some of the plaintiffs, the sub-broker soliciting participation and the underwriter who made the decision to participate were corporate affiliates, thus raising the possibility of some motive for participation unrelated to the defendants' inducing statements.

In light of these facts, the district court's finding that all plaintiffs had relied upon the false statements in the Placing Information is legally and factually insupportable and must be vacated. We remand with directions for the district court to determine which of the plaintiffs have proven reliance in conformity with the requirements of Massachusetts law, and to deny recovery in fraud to any plaintiff who has not met this burden.

IV. Contract Claims

We turn to the plaintiffs' contract claims.

(1) The slips called for the cession of "[b]usiness classified by the Reassured [NERCO] as ... Facultative Assumed business produced and underwritten by the Graham Watson division of Cameron & Colby Co., Inc." As we have held, the character of the business ceded could reasonably be classified as facultative business. We find insufficient record support for the court's finding that, "NERCO contracted under the SANS Treaties that Graham Watson would examine each individual risk submission by the ceding company on a risk-by-risk basis and, if the risk be accepted, . . . would then issue an individual certificate to the ceding company." We accordingly reject, as clearly erroneous, the court's finding of breach of contract based upon the supposed non-facultative character of the reinsurance retroceded to plaintiffs.

(2) The district court further found that

> NERCO also breached its contractual obligation to produce property and casualty facultative assumed business, for under the "automatic" and/or "semi-automatic" method of underwriting the reinsurance business is actually produced by the ceding source companies and not by the original reinsurer.

We hold this finding to be clearly erroneous. While the primary insured or its agent may indeed have the authority under the automatic or semi-automatic methods to initiate the issuance of the reinsurance, this can only be done pursuant to the reinsurer's authorization in the MFC or other advance arrangement. The reinsurance was clearly "produced" by defendants by negotiating and setting up the MFCs or other arrangements under which the business was assumed.

(3) The district court also found that NERCO breached its contractual representation that the business would be "underwritten" by Graham Watson. The district court found a contractual breach because, under the automatic and/or semi-automatic methods employed, "Graham Watson delegated its reinsurance underwriting authority to the source company to automatically cede risks to the SANS Treaties." The

district court was undoubtedly right that under the semi-automatic and like methods, the ceding company, or the MGA representing it, was given the right initially to assign the risks to NERCO, and through it to plaintiffs, before review by Graham Watson's underwriters. However, this was done under facilities previously entered into with Graham Watson, containing underwriting terms and requirements satisfactory to the latter. And, in the case of most of the business, Graham Watson had the right within a stated time to reject any risk upon receipt of the bordereau or lay-off sheet disclosing it, if the risk did not meet its underwriting approval. Graham Watson was underwriting the business, albeit using the streamlined facultative methods discussed earlier in the opinion. As we have held, these methods fall within the industry's purview of "facultative underwriting." Our decision on that point dictates rejection of the district court's above finding, which rests essentially on the erroneous view that the types of facilities defendants were using were illegitimate and unacceptable underwriting vehicles. We hold, therefore, that this finding, too, was clearly erroneous.

Having said this, we remain troubled by the evidence, and the court's findings, of possible systematic inadequacies in the quality of the underwriting performed. Conceivably, underwriting could be so deficient as to be tantamount to a breach of the duty to underwrite. Plaintiffs insisted, with support from their experts, that Graham Watson was less than diligent in its underwriting efforts once the risks were reported to it by means of the layoff sheets and bordereau. There was

evidence of delay and of inadequate underwriting data. There was also some evidence that Graham Watson's underwriters may never have rejected a single risk. The district court found that Graham Watson did not have "the quantity or quality of information it needed to facultatively underwrite the risks ceded to the SANS Treaties." This finding was, to be sure, based on the court's incorrectly narrow definition of facultative reinsurance, and was in support of its finding that Graham Watson did not perform facultative underwriting. Whether, under this court's very different view of the propriety of defendant's streamlined facilities, Graham Watson's "underwriting" could possibly be found to have been so inadequate as to violate its contractual duty to "underwrite" is a question we are in no position to answer. We leave this issue to the district court, on remand, with instructions to also decide whether other considerations -- such as the bar of the statute of limitations -- leave it viable.

(4) The district court found that NERCO "violated its contractual obligation to 'co-reinsure for 10 percent participation on all 'System Business' ceded hereunder, ' as required by Warranty No. 2 in the Slip." Warranty No. 2 reads as follows:

> 2) Reassured [NERCO] co-reinsure for 10% participation on all "System Business" ceded hereunder.

The plaintiffs argue that this term was inserted into the Slips at Bailey's insistence because he wanted NERCO to keep a significant risk in the business, thus providing it with "an increased incentive to exercise care and prudence in risk selection." They then argue that in fact, NERCO did not keep a 10 percent retention, but instead obtained outside reinsurance of that 10 percent which reduced the amount of risk it kept for itself to a "minuscule" amount. In other words, they read the Warranty to require a 10 percent unreinsured retention. The district court appears to have also read the warranty in this manner; this is the only reasonable reading of the court's statement, as there was no evidence that NERCO did not initially retain at least 10 percent of each risk it ceded.

The defendants respond that Bailey's testimony shows that the intent of the Warranty was not that NERCO could not obtain any reinsurance of its retention, but rather that NERCO should have exposure to losses that was equal to or greater than Bailey's firm's exposure. They point out that the evidence shows that, in fact, "NERCO's actual losses on the portion of the SANS risk portfolio that it retained (unreinsured) was $105,000,000 -- an amount virtually equal to all of the losses of all of the plaintiffs combined." (Emphasis in original.)

We believe the court was entitled to view the evidence on this point as it did. There is no doubt that NERCO did reinsure some portion of its retention; Hewitt admitted as much, and the plaintiffs introduced into evidence some of the reinsurance contracts used by

NERCO to reinsure the retention. There was also evidence on both sides of the question whether the parties intended Warranty No. 2 to require NERCO to keep an unreinsured retention. While there are no contemporaneous documents using the phrase "unreinsured retention" or words of similar import, several witnesses, including Nigel Huntington-Whitely, who was pivotally involved in the negotiation of this point, testified that an unreinsured retention was what was intended.

The issue of what the parties intended by this language is an issue of fact, which we must uphold absent clear error. See Commercial Union, 412 Mass. at 557, 591 N.E.2d at 172. We, therefore, affirm the district court's finding of breach of contract on this ground, subject, of course, to any relevant findings the district court may make on remand concerning the effect of the statute of limitations and other material issues remaining open, infra.

V. The Statute of Limitations

The defendants argue that "virtually" all of plaintiffs' claims should have been barred by the applicable statute of limitations defenses raised below. As already noted, we have not been able to find in the record any explanation by the district judge of his reasoning or his view of the law and the facts on these potentially dispositive issues. The possible effects of the various statutes of limitations on the different claims cannot be reviewed without findings and rulings based on the record. We, therefore, express no opinion at this

time but direct the district court, upon remand, to consider the impact of the applicable statutes of limitations on the various claims, and make appropriate findings and rulings.

The parties agree that the date from which to measure the statutes of limitations is July 12, 1988, when the plaintiffs first raised their claims of fraud and breach of contract,[32] by adding these claims to their Second Amended Complaint. The applicable statute of limitations for fraud is three years, Mass. Gen. L. ch. 260, § 2A; Tagliente v. Himmer, 949 F.2d 1, 4 (1st Cir. 1991); that for breach of contract is six years, Mass. Gen. L. Ann. ch. 260, § 2 (1992). The plaintiffs argue that each of these statutes is subject to the discovery rule, meaning that a cause of action did not accrue until the plaintiffs learned or reasonably should have learned of the factual basis for their claims. White v. Peabody Const. Co., Inc., 386 Mass. 121, 129, 434 N.E.2d 1015, 1020 (1982); see also Cambridge Plating Co., Inc. v. Napco, Inc., 991 F.2d 21, 26-28 (1st Cir. 1993) (discussing Massachusetts discovery rule); Tagliente, 949 F.2d at 4 (same). If plaintiffs' claims accrued prior to July 12, 1982 (contract) or July 12, 1985 (fraud), and unless the discovery rule applies so as to delay the

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[32]As we say below, the district court erred in finding liability under Mass. Gen. L. ch. 93A. Therefore, we do not discuss the statute of limitations relevant to that claim. Nor, do we discuss the statute of limitations relevant to the RICO claim because we affirm the district court's finding that RICO does not apply to the facts of this case.

accrual of the alleged causes of action beyond these dates, then those claims would have been barred.

There are various facts which, if proven to the satisfaction of the fact finder, might necessitate evaluation of whether any or all of plaintiffs' fraud, and possibly other, claims were time barred. There is, for example, uncontroverted evidence that the lead underwriter, Ralph Bailey, had personal knowledge prior to 1981 of defendants' use of the MGA Baccala & Shoop. Another matter to be examined is the disclosure in the 1981 Anniversary Information, distributed to the plaintiffs in late 1980, of the fact that business had been assumed from Baccala & Shoop. There are also in the record other indications of information being conveyed to one or more plaintiffs at various times, which need evaluation to determine whether the running of the limitations periods was triggered at those moments and with what effect. For example, some of the plaintiffs stopped paying claims made by NERCO as early as the fourth quarter of 1982. The plaintiffs were obligated to make such payments by their own reciprocal duty of utmost good faith, unless, of course, they had knowledge of a bona fide defense to payment, such as the defendants' fraud. See Contractors Realty Co., Inc. v. Insurance Co. of N. Am., 469 F. Supp. 1287, 1294 (S.D.N.Y. 1979) (noting the "reciprocal duty on the part of the insurer to deal fairly, to give the assured fair notice of his obligations, and to furnish openhandedly the benefits of a policy"). Also there were letters and testimony suggesting that certain people connected with

plaintiffs had knowledge as to various matters early in the 1980's.[33]

We direct the district court to evaluate all of these items, and any others it deems relevant, and to make such findings and rulings as it believes appropriate in the circumstances. We leave entirely to it, in the first instance, the determination of whether and how to apply the Massachusetts discovery rule or other relevant rule of law and how to calculate, on this record, the proper running of the applicable statutes of limitations.

VI. The Chapter 93A Claims

In a footnote, the district court found, without more, that "the conduct of NERCO constitutes a violation of Chapter 93A, Section 2 of the General Laws of the Commonwealth of Massachusetts." 825 F. Supp. at 383 n.9. Mass. Gen. L. ch. 93A, § 2 declares unlawful "unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or

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[33]For example, Eric Verhes of Compagnie de Reassurance D'Ile de France apparently knew of the use of Baccala and Shoop by mid-1982; and plaintiff Imperio Re exchanged a series of letters with NERCO via the sub-broker Carter Brito E Cunha Ltd. in late 1984 discussing the use of Baccala and Shoop, and commented in one dated December 21, 1984 that the fact that business was "underwritten by Baccala and Shoop . . . would appear to be a further point contravening the wording of the Contract."

commerce." Mass. Gen. L. ch. 93A, § 11 provides for the bringing of a civil action by the victim of such practices. An action may not be brought, however, "unless the actions and transactions constituting the alleged unfair method of competition or the unfair or deceptive act or practice occurred primarily and substantially within the commonwealth." Id.

The defendants argued below as they do on appeal that the acts and practices said to constitute a violation of § 2 did not occur primarily and substantially within the commonwealth, as required by § 11. The district court, however, made no finding on this important point. The closest the court came to finding where the critical conduct occurred was a statement, in the course of a colloquy with counsel, that it was "implicit . . . activities had to have been found in Massachusetts." The court went on to say that while "there were activities within the state that would constitute a violation of 93A, as I found . . . there are more important activities, more crucial activities that took place overseas." We are thus left without a specific finding and with considerable confusion as to what the court had in mind. Given the absence of guidance -- indeed, with guidance that points in opposite directions -- we must determine as best we can whether the § 11 locus requirement was met on this record.

In insisting that the acts and practices said to constitute a violation did not occur primarily and substantially within the commonwealth, the defendants assert as follows: The Placing Information was prepared by G.L. Hodson in New York. It was then transmitted to

the sub-brokers in London, and communicated by the sub-brokers from London to the plaintiffs at their places of business in London and continental Europe. The plaintiffs, to the extent they relied on any misrepresentations, did so in Europe, signed the slips and Treaty Wordings in Europe, and suffered any financial injury in Europe. As the judge himself indicated, "notwithstanding that there were activities within this state, at least and maybe the most crucial were overseas." The latter reason caused the court to refuse to award double or treble damages, a discretionary matter under § 11. Defendants argue that this shows a misreading of the statute, because if the district court found that the crucial actions creating liability had occurred overseas, they could not have occurred primarily and substantially in Massachusetts, hence he should have found no liability at all under ch. 93A. Defendants insist that if misleading statements are made in Massachusetts but are received and relied upon outside the commonwealth, there can be no liability under ch. 93A.

The plaintiffs reply that the district court implicitly found that the defendants failed to meet their statutory burden of proving that their fraudulent conduct did not occur primarily and substantially in the commonwealth. Plaintiffs disagree that the only relevant conduct is the placing of the Treaties overseas, and argue that the relevant conduct includes (1) the location of the defendants and their business, (2) the initial drafting of the placing information in Boston, prior to its communication to G.L. Hodson, (3) the fact that all subsequent false and deceptive information emanated

from Boston, (4) certain later meetings between various plaintiffs and defendants, and between defendants and their brokers, in Boston, (5) the place of performance of the contracts (Boston), (6) the day-to-day operation of the SANS program in Boston, (7) the alleged obstruction of plaintiffs' attempts to inspect NERCO's books and records in Boston, and (8) the reaping of the benefits of the fraud in Boston. They argue that Massachusetts case law does not provide a bright-line test for the "primarily and substantially" standard, but rather requires a "pragmatic, functional analysis" which must include consideration not only of where the communications, reliance, and injury took place, but also where the bulk of the more mundane activities occurred.

A finding whether the defendant has met its statutory burden of proving that its activities and transactions occurred primarily and substantially in Massachusetts is a matter of law, subject to plenary review. Clinton Hosp. Ass'n v. Corson Group, Inc., 907 F.2d 1260, 1264 (1st Cir. 1990). In Bushkin Assoc., Inc. v. Raytheon Co., 393 Mass. 622, 473 N.E.2d 662 (1985) the Supreme Judicial Court determined, on facts bearing much similarity to the transmission of the fraud claims here, that the violation did not occur "primarily and substantially within the commonwealth." Ch. 93A, § 11. The plaintiff, Bushkin, a New York resident, based his ch. 93A claim on "alleged representations made during a telephone call or calls in 1975 between a Raytheon officer in Massachusetts and Bushkin in New York." Id. at 638, 473 N.E.2d at 672. As a result of information Bushkin disclosed to Raytheon over the

phone, Raytheon learned that Beech Aircraft Corporation was a possible acquisition target. Bushkin alleged that Raytheon had promised to pay him a fee if it were successful in acquiring Beech. After telling him that it was no longer interested in Beech, Raytheon acquired it with the aid of another consultant, and denied Bushkin any compensation. Id. at 624-26, 473 N.E.2d at 664-65.

In finding against Bushkin, the SJC noted that the telephone calls were between the two states, the allegedly deceptive statements were made in Massachusetts but received and acted on in New York, and that any loss was incurred in New York. Id. Based on Bushkin, this court in Clinton Hosp. minimized the location of the dissembler at the time he makes a deceptive statement for purposes of the "primarily and substantially" analysis. "Rather," we said, "the critical factor is the locus of the recipient of the deception at the time of the reliance." Clinton Hosp., 907 F.2d at 1265-66. We likewise gave weight to the situs of the loss. Id.

Viewing the conduct surrounding the fraudulent misrepresentations in the Placing Information points to the same result as that reached in Bushkin. As in that case, non- Massachusetts residents are here attempting to recover for the allegedly unfair trade practices of a corporation in Massachusetts, under a statute designed to protect against instate frauds. As in that case, the defendant's day-to-day business activities were largely carried on in Massachusetts. As in that case, we shall assume that the allegedly deceptive acts or practices -- in particular, the Placing Information -- originated in

Massachusetts, but the Placing Information was intended to be, and was, circulated abroad, and plaintiffs received and acted upon it there. The situs of the plaintiffs' losses was also in Europe. It follows that with respect to plaintiffs' claims of fraud in the inducement, the defendants have met their statutory burden under § 11 of proving that their fraudulent conduct did not occur primarily and substantially in Massachusetts. On this point, we reverse the district court's ruling that defendants are liable under Mass. Gen. L. ch. 93A, § 2.

This does not, however, end the matter. In this opinion, we have sustained the district court's finding of a breach of contract stemming from defendants' violation of its contractual obligation to retain 10% of all system business ceded to the SANS Treaties. We have also left open, for further consideration on remand, a contract claim for possible failure to perform underwriting as promised. And we have left open the possibility, on remand, of a finding of fraudulent concealment of the use of intermediaries and of other conduct deviating from representations in the Placing Information, in the years following the initial Treaties. The above activities, or some of them, might conceivably support -- although we take no position at this time -- a finding of § 2 violations occurring primarily and substantially within Massachusetts. Accordingly, while we hold that fraud in the inducement based upon representations in the Placing Information did not occur primarily and substantially within Massachusetts, we do not at this time foreclose liability under Mass. Gen. L. ch. 93A based on different conduct

of the type mentioned above. We leave such determination to the district court on remand.

VII. The RICO Claims

In the same footnote in which it found the defendants liable under ch. 93A, the district court found for the defendants under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961-1968, stating that,

> Title 18, United States Code, Sections 1961-1968 do not apply to the facts of this case on the ground that the Plaintiffs have failed to establish that they suffered an "investment" injury under Section 1962(a) or an "acquisition" injury under Section 1962(b) or that the three Defendants were separate persons as required under Section 1962(c).

825 F. Supp. at 383 n.9.[34] In No. 93-2338, the plaintiff appeal from this ruling, arguing that the district court was wrong with respect to all three sections of RICO.

In order to recover in a civil RICO action, a plaintiff must prove both that the defendant violated one of the provisions of 18 U.S.C. § 1962 and that the plaintiff was injured "in his business or property by

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[34]No judgment dismissing the RICO claims was entered by the district court; the only disposition of those claims is the above-quoted language in the district court's Memorandum and Order of June 7, 1993. See Fed. R. Civ. P. 58 ("Every judgment shall be set forth on a separate document. A judgment is effective only when so set forth and when entered as provided in Rule 79(a)."). We proceed, however, as though the judgment for the plaintiffs issued on September 21, 1993 pursuant to that order had included language expressly dismissing the RICO claims. See Fiore v. Washington County Community Mental Health Ctr., 960 F.2d 229, 236 n.10 (1st Cir. 1992) (en banc) (holding that separate document requirement is waived by filing of timely notice of appeal) . "The 'separate document' rule does not defeat appellate jurisdiction where a timely appeal is filed and the parties do not suffer any prejudice from the absence of a separate document entering judgment on claims that were clearly disposed of in an earlier order." Southworth Mach. Co., Inc. v. F/V Corey Pride, 994 F.2d 37, 39 (1st Cir. 1993) (citations omitted); see also supra, n.18 (discussing failure of district court to expressly dismiss defendants' counterclaims)

reason of" the defendant's violation. 18 U.S.C. § 1964(c). Thus, in proving a right to recover for a RICO violation premised upon § 1962(a), the plaintiffs had to prove that they were harmed by reason of NERCO's use or investment of income derived from a pattern of racketeering activity in some enterprise (here alleged to be Graham Watson) engaged in interstate or foreign commerce. 18 U.S.C. §§ 1962(a), 1964(c). This they failed to do. Even assuming that they had been defrauded through the use of the mails or international wires, see 18 U.S.C. § 1961(1) (B), that alone is not enough to show that they were harmed additionally by NERCO's use or investment of the proceeds of that fraud to establish or operate Graham Watson. See, e.g., Lightning Lube, Inc. v. Witco Corp., 4 F.3d 1153, 1188 (3d Cir. 1993) ("the plaintiff must allege an injury resulting from the investment of racketeering income distinct from an injury caused by the predicate acts themselves") . The plaintiffs have simply "repeat[ed] the crux of [their] allegations in regard to the pattern of racketeering activity." Id.

Under § 1962(b), the plaintiffs had to show that they were harmed by reason of NERCO's acquisition or maintenance of control of an enterprise through a pattern of racketeering activity. Again, even assuming that plaintiffs proved the underlying RICO violation, they failed to prove any harm beyond that resulting from the fraud which constituted the predicate act. See, e.g., Danielsen v. Burnside-Ott Aviation Training Ctr., Inc., 941 F.2d 1220, 1231 (D.C. Cir. 1991) ("plaintiffs must allege an 'acquisition' injury, analogous to the 'use or investment injury' required under § 1962 (a) to show

injury by reason of a § 1962(b) violation"). The plaintiffs claimed that they were harmed by their participation in the SANS treaties, not by the defendants' acquisition or control of Graham Watson.

As to the § 1962(c) claim, the district court stated that "the three Defendants were [not] separate persons." In fact, however, NERCO, First State, and Cameron & Colby were distinct corporate entities, with separate legal identities. The distinction between those three entities is not, however, decisive for § 1962(c) purposes. The statute requires that the person (i.e., the three defendants) engaged in racketeering be distinct from the enterprise (in this case, Graham Watson, not a defendant) whose activities he or she seeks to conduct through racketeering. See, e.g., Miranda v. Ponce Federal Bank, 948 F.2d 41, 44-45 (1st Cir. 1991) (citing cases) ("the same entity cannot do double duty as both the RICO defendant and the RICO enterprise"). Assuming the court meant to find that NERCO, First State, and Cameron & Colby were not distinct from Graham Watson, it was clearly entitled, on the evidence presented, to make such a finding. Up until mid-1980, Graham Watson was merely an unincorporated division of Cameron & Colby. After that time, although it became a separate wholly-owned subsidiary corporation, all of its employees were in fact Cameron & Colby employees, and there is no evidence whatsoever that Graham Watson took any actions independent of its parent. Cf. Brittingham v. Mobil Corp., 943 F.2d 297, 302-303 (3d Cir. 1991) (noting that § 1962(c) claims may be dismissed "when the enterprise and defendant, although facially distinct, are in reality

no different from each other"). We accordingly affirm the district court's dismissal of the plaintiffs' RICO claims.

VIII. Damages

The district court ruled that "[i]n the circumstances of this case, it is not feasible to reasonably calculate damages on the basis of the 'benefit of the bargain' method of damages." The court accordingly (after further proceedings) entered judgment in the amount of $38,118,940.07 (which sum included prejudgment interest), plus postjudgment interest and costs. This sum was calculated to be the difference between claims paid by the plaintiff reinsurers less the premiums they received during the course of the SANS Treaties. The district court also announced in its Memorandum and Order of June 7, 1993 (but not in any separate judgment), that "the only appropriate remedy is to rescind the SANS Treaties as a matter of equity."

Defendants complain on appeal that plaintiffs should have been required to prove, and could only recover, "benefit of the bargain" damages. Defendants argue that plaintiffs in fact suffered no damage at all as "[t]he results achieved under the SANS Treaties were poor, but they were better than industry average results . . . . Plaintiffs' experts, who utilized individual certificate facultative underwriting, reluctantly admitted their own operations lost money and were closed down."

In defendants' view, the losses under the SANS Treaties were due to "extremely adverse market conditions -- low premiums and unprecedented loss experiences." As the judge commented, it was "a disastrous market." Defendants go on to point out that "[t]here was no evidence that brokerage-located business resulted in larger losses than business obtained 'directly.'"

The court, in its opinion excused the plaintiffs from establishing damages because, for plaintiffs to have done so,

> it would have been necessary to obtain the financial records of the major direct reinsurance companies . . . which financial records are confidential and not accessible to third parties.

We find no legal error in the court's decision to furnish relief for fraud based on cancelling plaintiffs' reinsurance obligations under the Treaties. When an insurer establishes that it was induced by fraud to issue policies of insurance, cancellation of the policy is a customary form of relief. See, e.g., Century Indem., 333 Mass. at 504-05, 131 N.E.2d at 769. To the extent that these plaintiffs were ceded shares in reinsurance under Treaties they were induced to join, and continued to participate in, because of defendants' fraud, the district

court was authorized, where otherwise appropriate, to provide the remedy of retroactively cancelling the applicable Treaties, reimbursing plaintiffs for their net losses, and absolving them from their unfulfilled reinsurance obligations thereunder.

In this opinion we have reversed the fraud finding based on the "facultative" representations, but have upheld it in respect to reliance on representations in the 1979 Placing Information regarding securing nontreaty business "directly" rather than through intermediaries. Thus a cancellation remedy for fraud may still be appropriate as to reinsurance retroceded to plaintiffs which was infected by that fraud. However, we have remanded for further consideration of whether the statutes of limitations, including that for fraud, constitute a bar to the claims of any or all plaintiffs. We have also remanded for consideration whether, at least in some cases, the original fraud was dissipated, or its duration limited to a particular year or years, by the receipt of knowledge of the falsity of the earlier representations coupled with renewal of the Treaty or other conduct indicating acquiescence or waiver. We have further remanded for consideration of whether certain of the plaintiffs are barred from relief for fraud because of their failure to establish reliance.

We accordingly vacate all relief granted by the court and remand for further findings on what relief, if any, is appropriate in light of the other findings that are made upon remand. If there are instances where recovery is appropriate for breach of contract only, rather than fraud, the court should determine the proper

measure of relief, and, subject to our rulings herein, the district court shall recalculate the proper award, if any is due, on the basis of its assessment of the law and facts.

IX. Prejudgment Interest

The defendants argue that the district court's order rescinding the SANS Treaties was a restitutionary award, not an award of damages. Thus, they say, the court's assessment of prejudgment interest at the rate of 12 percent set by Mass. Gen. L. ch. 231, §§ 6B, 6C, and 6H was erroneous, because the rate of interest set by those statutes is applicable only to awards of damages, not to rescissionary awards. They argue that the plaintiffs made an express election of remedies, choosing rescission and restitution, and thus foregoing their option to pursue the remedy of contract damages and interest on those damages. The defendants contend that prejudgment interest should have been applied at the rate of 6 percent set by Mass. Gen. L. ch. 107, § 3.

In light of the fact that we are vacating the award and remanding this case to the district court, where any judgment eventually awarded to either party may bear little resemblance to the judgment we vacate today, we decline the defendants' invitation to consider this point at length. We find it of interest, however, that § 6C has been held applicable to a recovery based on an action for money paid by mistake, Commercial Union, 412 Mass. at 555-56, 591 N.E.2d at 171-72, a recovery which seemingly bears more resemblance to restitution than to money damages.

X. Conclusion

Appeal No. 93-2339

We sustain the district court's findings and rulings on certain matters; reverse others either as being clearly erroneous or legally incorrect; and identify still others that require the district court to make findings and rulings now absent. We, therefore, vacate in its entirety the judgment awarding a total of $38,118,940.07 to the plaintiffs and remand with directions that the district court hold further proceedings and take such further actions as are necessary to comply with this opinion.[35] We summarize our specific dispositions as follows:

(1) We reverse as being clearly erroneous the district court's finding of fraud premised upon defendants' promise to cede "facultative" reinsurance.

(2) We sustain the court's finding that the defendants made misrepresentations in the Placing Information to the effect, inter alia, that they would obtain business directly from primary insurers.

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[35]As a matter of consistency, we likewise vacate the court's other directives not incorporated in its judgment purporting to afford relief, such as its equitable rescission of the SANS Treaties. Such orders should be revisited on remand and reissued, modified, or not as the court determines in light of this opinion and its own findings and rulings.

However, the claim of fraud based on this finding must be given further consideration on remand in light of our direction to reconsider the defendants' defense based on the statute of limitations; to revisit the reliance element and deny recovery to any plaintiff unable to satisfy its burden of proof on this point; and to reconsider the possible effects of any notice and knowledge obtained by any of the plaintiffs during the lives of the SANS Treaties and determine whether these defeat or limit the duration of any plaintiffs' continuing rights of recovery in fraud.

(3) We reverse the district court's finding of breach of contract based upon the supposed non-facultative character of the retroceded reinsurance. We also reverse the district court's finding of breach of contract based upon failure to "produce" the retroceded reinsurance. We reverse the district court's breach of contract finding based on the promise that Graham Watson would "underwrite" the retroceded reinsurance, except we leave open for the court to consider, on remand, whether the underwriting might have been so entirely inadequate as to violate that provision. We affirm the district court's finding of breach of contract based upon the violation of Warranty No. 2 in the slips, subject to further findings on the effect of the statute of limitations and any other bar to recovery.

(4) We direct the court to consider and make specific findings and rulings as to the statutes of limitations defenses and to find the dates that each of the relevant statutes began to run as to each of the plaintiffs.

(5) We direct the court to recalculate the proper amount of relief and prejudgment interest to the extent its other determinations on remand are consistent with the awarding of relief to any of the plaintiffs. We have upheld, as a remedy, the cancellation of any reinsurance infected by fraudulent representations and leave to the court on remand the determination of any other theories of relief that may become appropriate.

(6) We reverse the court's allowance of plaintiffs' claims under Mass. Gen. L. ch. 93A, § 2 insofar as they are based on fraud in the inducement. However, we remand for the district court's further consideration whether any other conduct, as mentioned in this opinion, might support a finding of liability under that statute.

Appeal No. 93-2338

We affirm the district court's dismissal of plaintiffs' claims under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-1968.

So ordered. Each side to bear its own costs on appeal.

APPENDIX
BLAND PAYNE REINSURANCE
Brokers Limited 17001196

The Graham Watson division has recently been established by Cameron & Colby after a lengthy study of the facultative reinsurance operations in North America. This project has been discussed by Cameron & Colby with the Hartford and ITT, who have given their approval and support for this project.

The purpose of the Graham Watson division is twofold:

1. To participate in the property and casualty facultative reinsurance business which is currently dominated by the direct writers.

2. To rationalize the facultative placements of both the Hartford and the First State not only from an administration point of view but also to provide the retrocessionaires with a broad cross section of facultative reinsurance emanating from these two companies.

A recent analysis conducted by a leading reinsurance executive has indicated that out of a total facultative reinsurance premium, both property and casualty ceded by U.S. companies of approximately 1.6 billion per annum, over 80% is non-brokered and placed significantly with the direct professional reinsurance market. Graham Watson is charged with the responsibility of penetrating this business, to be written in the New England Reinsurance Corporation.

Facultative reinsurance emanating from reinsurance intermediaries will continue to be written separately through NERFAC.

It is not the intention that Graham Watson will seek facultative reinsurance on a wholesale basis from all and sundry but it is the intention that it shall develop a close working relationship with selected primary companies.

It is appreciated that it will take time to establish these relationships on a proper and sound basis and therefore in the meantime the majority of business will emanate from the "System" which is essentially the Hartford and First State.

The majority of this business is presently ceded to the direct writing reinsurers, and therefore the business underwritten by Graham Watson will be almost entirely business which has not and would not be available to the brokered reinsurance market.

It is not intended that Graham Watson will absorb all the facultative reinsurance requirements of either the Hartford or First State. However, it is the intention that the reinsurances to be arranged will receive a sufficient cross section of this business and will develop a mutually profitable relationship between New England Reinsurance Corporation and its retrocessionaires.

It is estimated that by the end of 1980 the premium on an annualized basis will be $20M divided approximately 60% casualty and 40% property. This does not take into consideration any Non-System business. The commission allowances proposed are not inconsistent with terms allowed in the facultative marketplace on subject matter business.

It should be noted that there is no profit commission on the casualty business, but on both property and casualty an allowance will be made at the end of each year on the earned premiums so that NERCO may share in the investment income.

REASSURED	NEW ENGLAND REINSURANCE CORPORATION
PERIOD	Continuous Contract commencing 1st February 1980 and subject to cancellation upon 120 days prior written notice at December 31, 1980 or any subsequent December 31st.
	In the event of cancellation Reinsurers shall remain liable hereunder as respects business in force as of the date and time of cancellation for a period not exceeding one (1) year plus odd time.
	Reinsurers shall also be liable hereunder as respects any cessions applicable to business bound prior to the receipt of the notice of cancellation but which is effective subsequent to the date and time of cancellation. However, Reinsurers shall not be liable as respects such business where the effective date is beyond sixty (60) days from the date of cancellation.

	Notwithstanding the above, the Reassured at its option may disregard the run-off provision hereof by giving written notice to Reinsurers prior to the effective date of cancellation. In such event Reinsurers shall return to the Reassured the unearned premium reserve as respects cessions in force hereunder less the ceding commission provided for hereunder and Reinsurers shall not be liable for losses occurring subsequent to the date and time of cancellation.
TYPE	PROPERTY AND CASUALTY SURPLUS TREATY
INTEREST	Business classified by the Reassured as Property and Casualty Facultative Assumed business produced and underwritten by the Graham Watson division of Cameron & Colby Co., Inc.
	EXCLUSIONS: As per Schedules attached and/or to be agreed Leading Underwriter only.

TREATY DETAIL

SECTION A - PROPERTY

Five (5) lines subject to a cession limit of $5,000,000 as respects any one risk.

The Reassured's minimum net retention hereunder shall be $250,000 as respects any one risk.

SECTION B - CASUALTY

Five (5) lines subject to a cession limit of $5,000,000 as respects any one risk.

As respects certificates which provide for an aggregate limit of liability and which attach during the currency of this Reinsurance. It is understood and agreed that all loss or losses subject to such aggregate limit occurring thereunder shall, for the purposes of this Reinsurance, be deemed to have occurred at the inception date of each certificate period. As used herein the term "certificate period" shall mean each aggregate period of a certificate which provides for aggregate

limits of liability, not to exceed one (1) year plus odd time.

The Reassured's minimum net retention hereunder shall be $250,000 as respects any one risk.

As respects both Sections A and B, the Reassured shall be the sole judge of what constitutes one risk and the net retention appropriate thereto. However, the Reassured will not knowingly cede to this Contract more than $5,000,000 where there is an identifiable accumulation of limits which are subject to one loss arising out of the same cause.

WARRANTIES

1) All cessions hereunder in respect of "System Business" not to exceed 50% of original reinsurance limit.
2) Reassured co-reinsurance for 10% participation on all "System Business" ceded hereunder.

RATE

Gross Original Rates

Written Premiums Basis

COMMISSION

SECTION A - PROPERTY

1) Thirty-one and one-half percent (31 ½%) on the net written premiums ceded hereunder as respects business assumed on a pro-rata basis. Twelve and one-half percent (12 ½%) on the net written premiums ceded hereunder as respects business assumed on an excess of loss basis.

2) In addition, at the close of each calendar year, Reinsurance shall make to the Reassured a further allowance equal to one percent (1%) of the annual premium earned hereunder.

SECTION B - CASUALTY

1) Twenty-eight and one-half percent (28 ½%) on the net written premiums ceded

		hereunder as respects business assumed on a pro-rata basis. Eleven and one-half percent (11 ½%) on the net written premiums ceded hereunder as respects business assumed on an excess of loss basis.
	2)	In addition, at the close of each calendar year, Reinsurers shall make to the Reassured a further allowance equal to four percent (4%) of the annual premium earned hereunder.
TAXES		1% Federal Excise Tax (where applicable)
BROKERAGE		2% on gross earned premium
CASH LOSS		Upon request of the Reassured individual claim payments where the 100% reinsurance recovery is $100,000 or greater.
ACCOUNTS AND SETTLEMENTS	(i)	Monthly Accounts, as soon as practicable after the close of each month.

(ii) Balances to be paid within sixty (60) days.

GENERAL CONDITIONS As respects so-called "System Business" ceded to this Treaty, the net retention borne by a Company within the System, other than the Reassured, shall constitute compliance with the net retention requirement hereon. The reinsurance hereunder shall apply in respect of losses occurring as defined in the Reassured's certificates. LOC's as required by the Reassured for Unearned Premiums and Outstanding losses in respect of Non-Authorized Reinsurers only.

For purposes of the net retention requirement hereon as regards "System Business", quota share and excess of loss reinsurance maintained by a company within the System shall be disregarded.
For purposes of the net retention requirement hereon as regards "Non-System Business", only excess of loss reinsurances maintained by the Reassured shall be disregarded.
Errors and Omissions Clause
Insolvency Clause
G.L. Hodson & Son, Inc., Intermediary Clause (1978).

WORDING	To be agreed Leading Underwriter only.
INTERNAL ARRANGEMENT	Signing slips, special agreements and acceptances hereunder, provided Treaty Limits are not exceeded, to be agreed by Leading Underwriter only. Renewals of risks previously specially agreed, to be accepted without further agreement. PORTFOLIO TRANSFER OF UNEARNED PREMIUMS - Assumption and return where applicable. Agree issue separate signing slips and Contract Wordings, if required. (Signing slips t.b.a. L/U only).

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 93-2338

COMPAGNIE DE REASSURANCE D'ILE DE FRANCE, ET AL.,
Plaintiffs, Appellants,

v.

NEW ENGLAND REINSURANCE CORPORATION, ET AL.,
Defendants, Appellees.

No. 93-2339

COMPAGNIE DE REASSURANCE D'ILE DE FRANCE, ET AL.,
Plaintiffs, Appellees,

v.

NEW ENGLAND REINSURANCE CORPORATION, ET AL.,
Defendants, Appellants.

Before

Torruella, Chief Judge,
Campbell, Senior Circuit Judge,
and Carter, District Judge*

ORDER OF COURT

Entered: June 19, 1995*

* Assignment of this case on remand shall proceed in accordance with Local Rule 40.1(i) (1995) of the District Court for the District of Massachusetts. This court looks to the judge below to exercise his good discretion under the Rule and within this court's precedent, see, e.g., O'Shea v. United States, 491 F.2d 774, 778-80 (1974, to determine whether to return the case to the Clerk for reassignment or to retain it.

It is this court's view that in the interests of judicial economy and fairness to all of the parties, the resolution of the issues to be resolved on remand should be accomplished on the existing record unless the court having charge of the proceedings on remand finds some exigent circumstance that requires the taking of additional evidence on a particular issue or issues.

By the Court:

Francis P. Scigliano

Clerk

(Certified copy to Robert Smith, Clerk, USDC of MA)
(cc: Messrs, Frank & Taylor)

---

* Of the District of Maine, sitting by designation.

UNITED STATES COURT OF APPEALS –
FOR THE FIRST CIRCUIT

NO. 93-2339

COMPAGNIE DE REASSURANCE D'ILE DE FRANCE, ET AL.,
Plaintiffs, Appellees,

v.

NEW ENGLAND REINSURANCE CORPORATION, ET AL.,
Defendants, Appellants.

JUDGMENT

Entered: June 19, 1995

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, it is now here ordered, adjudged and decreed as follows: The findings and rulings on certain matters are sustained; reversed on others either as being clearly erroneous or legally incorrect; and identify others that require the district

court to make findings and rulings now absent. The judgment of the district court awarding a total of $38,118,940.07 to the plaintiffs is vacated in its entirety and the cause is remanded to the district court with directions to hold further proceedings and take further actions as are necessary to comply with the opinion issued this date.

Each side to bear its own costs on appeal.

By The Court:

Francis P. Scigliano

Clerk.

[cc: Messrs. Frank & Taylor]

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

NO. 93-2338

COMPAGNIE DE REASSURANCE D'ILE DE FRANCE, ET AL.,
Plaintiffs, Appellants,

v.

NEW ENGLAND REINSURANCE CORPORATION, ET AL.,
Defendants, Appellees.

JUDGMENT

Entered: June 19, 1995

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, it is now here ordered, adjudged and decreed as follows: The district court's dismissal of plaintiffs's claims under the

Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-1968 is affirmed.

Each side to bear its own cost on appeal.

By The Court:

Francis P. Scigliano

Clerk.

[cc: Messrs. Frank & Taylor]

A170

OFFICE OF THE CLERK
UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

FRANCIS P. SCIGLIANO
Clerk

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June 22, 1995

To Counsel, West Publishing Company, Commerce Clearing House, National Center for Automated Information Retrieval, Mass. Lawyers Weekly and Bureau of National Affairs

Nos. 93-2338, 93-2339. COMPAGNIE DE ASSURANCE D'ILE DE FRANCE, ET AL., v. NEW ENGLAND REINSURANCE CORPORATION, ET AL.

Dear Sirs:

Enclosed herewith to each of you is a copy of an errata sheet regarding the above-captioned opinion which was released June 19, 1995.

By the Court:

Francis P. Scigliano

Clerk.

FPS/ji
Enclosures

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UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 93-2338

COMPAGNIE DE REASSURANCE D'ILE DE FRANCE, ET AL.,
Plaintiffs, Appellants,

v.

NEW ENGLAND REINSURANCE CORPORATION, ET AL.,
Defendants, Appellees.

No. 93-2339

COMPAGNIE DE REASSURANCE D'ILE DE FRANCE, ET AL.,
Plaintiffs, Appellees,

v.

NEW ENGLAND REINSURANCE CORPORATION, ET AL.,
Defendants, Appellants.

ERRATA SHEET

The opinion of this court issued on June 19, 1995, is amended as follows:

p.48, l.4: Change "note 24" to "note 20".

p.49, l.15: Change "note 23" to "note 21".

p.87, l.18: Change "occurred" to "did not occur".

p.91, l.4: Change "the plaintiff appeal" to "the plaintiffs appeal".

p.91, n.34, 3rd line from bottom: Change "n.18" to "n.16".

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 93-2338

COMPAGNIE DE REASSURANCE D'ILE DE FRANCE, ET AL.,
Plaintiffs, Appellants,

v.

NEW ENGLAND REINSURANCE CORPORATION, ET AL.,
Defendants, Appellees.

No. 93-2339

COMPAGNIE DE REASSURANCE D'ILE DE FRANCE, ET AL.,
Plaintiffs, Appellees,

v.

NEW ENGLAND REINSURANCE CORPORATION, ET AL.,
Defendants, Appellants.

Torruella, Chief Judge,
Campbell, Senior Circuit Judge,
and Carter, District Judge.

ORDER OF COURT

July 12, 1995

After considering plaintiffs' petition for rehearing, the panel makes the following changes in its opinion dated June 19, 1995. The second and third sentences of footnote 14 are changed so as to read as follows:

---

* Of the District of Maine, sitting by designation.

> The plaintiffs introduced evidence which, the defendants argue, showed the last quarter in which each plaintiff made a payment to the defendants. The earliest was Kansa Reinsurance, which ostensibly made its last payment no earlier than the fourth quarter of 1982; the latest were nine plaintiffs including Uni Storebrand, Sampo, and the seven companies bound through Aurora Underwriters, all of whom, it is argued, made their last payments no earlier than the fourth quarter of 1986.

The word "dictate" in the thirteenth line of the first full paragraph on p. 34 of the opinion is changed to "dictated."

The petition for rehearing is otherwise denied.

By the Court:

FRANCIS P. SCIGLIANO,
Clerk

By: _____
Chief Deputy Clerk

[cc: Messrs. Frank and Taylor]

Supreme Court, U.S.
FILED
NOV 1 1995
CLERK

No. 95-478

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

COMPAGNIE DE REASSURANCE D'ILE DE FRANCE, *et al.*,

Petitioners,

v.

NEW ENGLAND REINSURANCE CORPORATION, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF OF RESPONDENTS NEW ENGLAND REINSURANCE CORPORATION, FIRST STATE INSURANCE COMPANY, AND CAMERON & COLBY CO., INC. IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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31 pp

QUESTIONS PRESENTED

1. Does a plaintiff state a claim under 18 U.S.C. § 1962(a), where it only alleges injury caused by predicate acts of mail and wire fraud but does not (and cannot) allege any injury "by reason of" the use or investment of income derived from a pattern of racketeering activity?

2. Does a plaintiff state a claim under 18 U.S.C. § 1962(b), where it only alleges injury caused by predicate acts of mail and wire fraud but does not (and cannot) allege any injury "by reason of" the acquisition or control of an enterprise through a pattern of racketeering activity?

LIST OF RESPONDENTS' PARENT AND NON-WHOLLY OWNED SUBSIDIARIES

Parent Companies

ITT Corporation is the parent company of all three respondents. ITT New England Management Co., Inc. is the corporate successor to respondent Cameron & Colby Co., Inc.

Non-Wholly Owned Subsidiaries

There are no non-wholly owned subsidiaries to declare.

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No. 95-478

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

COMPAGNIE DE REASSURANCE
D'ILE DE FRANCE, *et al.*,

Petitioners

v.

NEW ENGLAND REINSURANCE
CORPORATION, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari
to the United States Court of Appeals for the First Circuit

BRIEF OF RESPONDENTS NEW ENGLAND REINSURANCE CORPORATION, FIRST STATE INSURANCE COMPANY, AND CAMERON AND COLBY CO., INC. IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respondents New England Reinsurance Corporation ("New England Re"), First State Insurance Company ("First State"), and Cameron & Colby Co., Inc. ("Cameron & Colby") hereby oppose the petition for a writ

of certiorari to review the decision of the United States Court of Appeals for the First Circuit in this case.

SUMMARY OF THE REASONS FOR DENYING THE WRIT

Petitioners seek interlocutory review of one aspect of a decision of the United States Court of Appeals for the First Circuit. Remand proceedings are ongoing in the District Court. This Court should deny certiorari because the issues raised by the instant petition are likely to be rendered moot by findings and rulings on at least three separate state law issues which are to be decided by the District Court during the remand proceedings. The remand proceedings will establish that petitioners cannot prevail on their RICO claims -- even on petitioners' interpretation of RICO -- because (1) petitioners' claims are barred by the statute of limitations, (2) petitioners cannot prove the elements of the RICO predicate offenses, and (3) petitioners waived the fraud claim which forms the basis for their RICO claims.

Moreover, there is virtually no conflict among the circuits. The First Circuit's decision under 18 U.S.C. § 1962(a) is part of an eight-to-one consensus among the courts of appeal. Its decision under 18 U.S.C. § 1962(b) is consistent with all of the circuit court decisions on the issue. This Court has twice recently denied certiorari review of decisions which are virtually identical to the decision below. The present decision only solidifies the existing consensus among the courts of appeals.

Finally, the First Circuit's decision is compelled by the plain words of Sections 1962(a) and (b) and 18 U.S.C. § 1964(c). Those provisions, read together, allow recovery for injuries occurring "by reason of" the investment of the proceeds of racketeering activity (Section 1962(a)) or "by reason of" the acquisition or maintenance of control in an

enterprise by racketeering activity (Section 1962(b)). Petitioners alleged and proved neither.

STATEMENT OF THE CASE

A. The Parties.

The petitioners are thirty-two British and continental European reinsurance entities. Several are syndicates at Lloyds of London. Others are reinsurance companies. Together, they are among the most sophisticated reinsurers in the world.

New England Re is a reinsurance company. First State is a primary insurance company. Cameron & Colby managed the business of New England Re and First State. All three were, at all relevant times, subsidiaries of the Hartford Group of Insurance Companies.

B. The Factual Context.

This case involves the business of reinsurance. Under a reinsurance agreement, the reinsurer agrees to pay to a primary insurer (*i.e.*, a company that sells insurance to the public) a predefined portion of losses incurred by the primary insurer on an identified risk or group of risks. In exchange, the primary insurer pays a premium to the reinsurer. Like primary insurers, reinsurers often seek to reduce their exposure to losses from a particular risk(s). To that end, they reinsure a portion of their reinsurance, a process called "retrocession." In insurance parlance, a primary insurer "cedes" risks and premium to a reinsurer; a reinsurer "retrocedes" a portion of those risks and that premium to a retrocessionaire. *Compagnie de Reassurance D'Ile de France v. New England Reinsurance Corp.*, 57

F.3d 56, 62 (1st Cir. 1995), Pet. App. at A52;[1] *Sumitomo Marine v. Cologne Reinsurance*, 75 N.Y.2d 295, 301, 552 N.E.2d 139, 142 (1990).

The parties' disputes relate to a series of retrocessional agreements, called the "SANS treaties." Tr. 29:67-74; D.Exs. 54-56; Tr. 23:125-126.[2] The treaties were contracts. They were entered annually and covered each of the years 1980-1983. The treaties contemplated that New England Re would reinsure risks initially written by primary insurance companies and would then retrocede a portion of those risks, and associated premium, to the petitioners. *See* D. Exs. 1, 4.

It turned out that the SANS treaties were written at a time in the reinsurance business that the Court of Appeals described as "disastrous." *Compagnie*, 57 F.3d at 92, Pet. App. at A146. Although the treaties produced better than industry average results, they generated significant losses for all concerned -- especially New England Re which retained the largest share of the SANS risks. Tr. 29:67-74; D. Exs. 54-56; Tr. 23:125-126; Tr. 28:139-149; D. Exs. 40-41.

Between 1980 and 1983, New England Re retroceded risks and paid premiums to the petitioners. The petitioners accepted those premiums, and, for a time, they paid their share of the losses. *See* P.Ex. 470. However, as losses

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[1] References to "Pet. App." indicate the page(s) of the Appendix to the Petition.

[2] References to "Tr." indicate the volume(s) and page(s) of the trial transcript. References to "D. Ex." and "P. Ex." are to the defendants' (respondents') and plaintiffs' (petitioners') trial exhibits, respectively.

mounted, many of the petitioners stopped paying. P.Ex 475; Tr. 22:67. In 1988, years after the treaties were written, petitioners claimed that the treaties had been induced by fraud, and they sought rescission.

In advance of each treaty year, New England Re circulated to the petitioners and others placing materials -- written statements describing, in summary fashion, the reinsurance to be retroceded and the proposed terms of the retrocession. The petitioners alleged that many of the statements contained in the placing materials were misrepresentations, that the petitioners were induced by the misrepresentations to join in the SANS treaties, and that the SANS treaties produced losses.

The instant petition results from the petitioners' repeated, unsuccessful attempts to expand their common law fraud/rescission claim into a RICO treble damage action. They allege (1) that the circulation of placing materials containing misrepresentations constituted mail or wire fraud, and (2) that as a result of that mail or wire fraud, the petitioners entered the SANS treaties, on which they lost money.

C. The Proceedings Below.

1. The District Court Decision.

This action was commenced in the United States District Court for the District of Massachusetts on January 6, 1987. The claims asserted in the original Complaint were substantively different from those which are now alleged. *Compagnie*, 57 F.3d at 68-69, Pet. App. at A72-73. On July 12, 1988, almost nine years after the first of the SANS treaties was executed, the petitioners sought (and they were later granted) leave to file a Second Amended

Complaint in which they advanced several previously unasserted claims, including the petitioners' fraud and RICO claims.

On June 7, 1993, after a jury-waived trial, the District Court (Harrington, J.) found that New England Re fraudulently induced the petitioners to enter, and breached, each of the SANS treaties. However, the court rejected petitioners' RICO claims. It held that the petitioners failed to establish that they suffered an injury caused by a violation of 18 U.S.C. §§ 1962(a) or (b). *Compagnie*, 825 F. Supp. 370, 383 n. 9 (D. Mass. 1993), Pet. App. at A38.

2. The First Circuit Decision.

On June 19, 1995, the First Circuit affirmed the dismissal of petitioners' RICO claims and reversed the trial court's decision in favor of the petitioners on their fraud and contract claims.[3]

The Court of Appeals began by addressing petitioners' common law claims. It identified numerous errors of law in the District Court's decision, reversed many of its factual findings as clearly erroneous, and vacated the judgment. In particular, the Court of Appeals reversed all but one of the trial court's findings that New England Re's placing materials contained misrepresentations. It left standing only the District Court's finding that, in placing materials circulated in advance of the execution of the 1980 SANS

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[3] The District Court held that New England Re had violated Chapter 93A, § 2 of the Massachusetts General Laws, the Massachusetts unfair trade practices statute. The First Circuit reversed that ruling as well. *Compagnie*, 57 F.3d at 89-91, Pet. App. at A135-141.

treaties, New England Re misrepresented its intention to obtain reinsurance business *directly*[4] from *primary*[5] insurers. However, the Court of Appeals remanded this case to the District Court for the purpose of determining, *inter alia*, whether the petitioners' primary/direct claim is barred by the relevant statutes of limitations, whether each or any petitioner proved that it relied upon the primary/direct misrepresentation, and whether the petitioners acquiesced in New England Re's conduct or otherwise waived their fraud claims. *Compagnie*, 57 F.3d at 84, 86, 89, 94, Pet. App. at A121-123, 126-127, 149-150. Thus, contrary to petitioners' statement, the First Circuit did not affirm the "critical finding" of fraud. *See* Petition at 16. Rather, it stated that there was sufficient evidence to support a finding that New England Re made a single misrepresentation and that "the claim of fraud based on this finding must be given further consideration on remand." *Compagnie*, 57 F.3d at 94, Pet. App. at A150. Petitioners have not prevailed on *any* fraud related claim in this action.

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[4] Reinsurance business may be obtained from primary insurers by the use of brokers or other intermediaries, or it may be obtained "directly" (*i.e.* without the use of intermediaries). New England Re obtained a portion of the reinsurance that it retroceded to petitioners by the use of insurance intermediaries. The petitioners conceded in the trial court that business obtained through brokers and intermediaries is not inherently better or worse than business obtained directly from primary insurers. Tr. 30:66, 67. *See* Tr. 23:22; 25:106.

[5] It is undisputed that the risks reinsured by New England Re (and retroceded to the petitioners) were written, in the first instance, by primary insurance companies -- indeed, the highest quality, highest rated primary insurers in the United States. Tr. 27:133-143.

The First Circuit then turned to petitioners' RICO claims. *Compagnie*, 57 F.3d at 91-92, 94, Pet. App. at A141-145, 151. In accordance with the decisions of seven other federal courts of appeals, the court explained that "[e]ven assuming that [petitioners] had been defrauded through the use of the mails or international wires [the alleged predicate acts] . . . that alone is not enough." *Id.* It held that under 18 U.S.C. § 1962(a) a plaintiff must "prove that [it was] *harmed* by reason of [the] use or investment of income derived from a pattern of racketeering activity." *Compagnie*, 57 F.3d at 91, Pet. App. at A143 (emphasis by the court). Similarly, and consistent with the decisions of all three of the other federal courts of appeals to consider the issue, the First Circuit held that in order to recover on a claim under 18 U.S.C. § 1962(b), the petitioners were required to demonstrate that they were harmed by the respondents' "acquisition or maintenance of control of an enterprise through a pattern of racketeering activity." The court held that petitioners claimed only that they were "harmed by their participation in the SANS treaties," not by the use or investment of the proceeds of racketeering activity, and not by the acquisition or control of any enterprise through a pattern of racketeering activity. *Compagnie*, 57 F.3d at 92, Pet. App. at A144. It, therefore, affirmed the dismissal of petitioners' RICO claims. *Compagnie*, 57 F.3d at 91-92, Pet. App. at A141-145.

3. The Present Status of the Case.

The case is presently pending in the District Court. Remand proceedings are underway. Initial briefs on the statute of limitations issue are due on November 7, 1995. The trial court has stated its intention to proceed to other issues after it determines which of petitioners' claims, if

any, survive the application of the relevant statutes of limitations.

STATEMENT OF REASONS FOR DENYING THE WRIT

I

THE RICO ISSUES RAISED IN THE PETITION WILL LIKELY BECOME MOOT AS A RESULT OF DECISIONS TO BE MADE DURING THE REMAND PROCEEDINGS.

This Court ordinarily declines to review interlocutory decisions. *E.g., VMI v. United States*, 113 S.Ct. 2431, 2432 (1993) (order denying certiorari and opinion of Scalia, J., respecting the denial of certiorari) (declining to review action remanded for determination of remedy; "[w]e generally await final judgment in the lower courts before exercising our certiorari jurisdiction"); *Firemen v. Bangor & A.R. Co.*, 389 U.S. 327, 328 (1967) ("because the Court of Appeals remanded the case, it is not yet ripe for review by this Court"); *Hamilton Shoe Co. v. Wolf Brothers*, 240 U.S. 251, 258 (1916). *See also Amer. Const. Co. v. Jacksonville Railway*, 148 U.S. 372, 384 (1893).

The instant petition is interlocutory in nature. This case is presently pending in the District Court on remand. The District Court is required by the terms of the remand to address certain issues. As will be demonstrated below, the questions presented by the instant petition are likely to be rendered moot by the District Court's resolution of the issues which the District Court is required to decide. The remand proceedings will establish, among other things, that:

> (a) the petitioners' RICO claims are barred by the statute of limitations;

(b) the petitioners cannot prove elements of the alleged RICO predicate offenses of mail and wire fraud; and

(c) the petitioners waived their fraud claims.

Because the decision of these issues, individually or collectively, is likely to destroy the basis for the petitioners' RICO claims -- even on petitioners' interpretation of RICO -- consideration of the issues advanced in the instant petition should await a final decision by the courts below. When a final decision has been rendered, this Court may determine whether any issue is appropriate for review. *E.g., VMI*, 113 S. Ct. at 2432 (opinion of Scalia, J., respecting the denial of certiorari) (denial of petition during remand "does not, of course, preclude [petitioner] from raising the same issues in a later petition, after final judgment has been rendered"); *Washington v. Fishing Vessel Assn.*, 443 U.S. 658, 672 n. 19 (1979).

A. The Petitioners' RICO Claims Are Likely Barred By The Statute Of Limitations.

The First Circuit directed the District Court on remand "to consider the impact of the applicable statutes of limitations on the various claims." *Compagnie*, 57 F.3d at 88, Pet. App. at A132-133. The District Court has recently requested briefing on the statute of limitations issues, stating that "[t]he Court of Appeals' analysis of the statute of limitations issue suggests that a significant part of plaintiffs' case may be time barred." Procedural Order dated October 5, 1995.

The District Court's ruling on this issue is likely to render the instant petition moot. The petitioners first asserted their fraud and RICO claims on July 12, 1988. The limitations period must be measured from that date.

Compagnie, 57 F.3d at 88, Pet. App. at A133. New England Re's alleged misrepresentation -- that it planned to obtain reinsurance directly from primary insurers -- was made (and its alleged mail and wire fraud, therefore, occurred) in 1979, prior to the signing of the 1980 SANS treaties. In late 1980, New England Re fully and accurately disclosed to all petitioners that, during 1980, New England Re did not, in fact, obtain certain reinsurance directly from primary insurers.

A four-year statute of limitations applies. *Agency Holding Corp. v. Malley-Duff & Associates*, 483 U.S. 143 (1987). The petitioners' claims were asserted eight and one-half years after the occurrence, and seven and one-half years after the disclosure, of the alleged fraud. The petitioners' RICO claims are, therefore, barred by the statute of limitations.[6]

B. The Petitioners Likely Failed To Prove Elements Of The Alleged Predicate Acts.

In order to prevail on a claim under 18 U.S.C. §§ 1962(a) and (b), a plaintiff must establish that there has been a "pattern of racketeering activity." 18 U.S.C. § 1962. The petitioners argue that the misrepresentation in New England Re's 1980 placing materials (circulated in

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[6] Although RICO issues will not be before the District Court on remand, the same (or closely related) conduct forms the basis both for petitioners' RICO claims and for their common law fraud (three-year statute of limitations) and Massachusetts Chapter 93A (four-year limitations period) claims. As a result, the District Court will make findings and rulings in the remand proceedings which bind the parties, and which will effectively resolve statute of limitations issues relating to petitioners' RICO claims.

1979) constituted mail and wire fraud, and, thus, "racketeering activity." To sustain this theory, the petitioners must prove each of the elements of mail or wire fraud. One of the elements of mail and wire fraud is reliance. *Appletree Square I v. W.R. Grace & Co.*, 29 F.3d 1283, 1286 (8th Cir. 1994); *Central Distributors of Beer, Inc. v. Conn*, 5 F.3d 181, 184 (6th Cir. 1993).

At trial, many petitioners offered no evidence whatsoever that they received, saw, read or relied upon, the 1980 placing materials. *Compagnie*, 57 F.3d at 85-86, Pet. App. at A123-127.[7] Other petitioners testified that they relied on statements in the 1980 placing materials that were different from, and not related to, the only statement that the Court of Appeals ultimately held to be a misrepresentation. All of the petitioners renewed their participation in the 1981 SANS treaties *after* the existence of the alleged misrepresentation was disclosed. *See* pp. 13-14, *infra*.

In prior proceedings, the trial court allowed the petitioners to recover on their common law fraud claims without ever proving actual reliance. *Compagnie*, 57 F.3d at 85, Pet. App. at A123-124. The First Circuit reversed. It held that the trial court's failure to require proof of actual reliance was error. *Compagnie*, 57 F.3d at 84-86., Pet. App. at A124-126. It expressly directed the District Court on remand "to revisit the reliance element and deny recovery to any plaintiff unable to satisfy its burden of proof on this point." *Compagnie*, 57 F.3d at 94, Pet. App.

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[7] The remand proceedings are confined to the existing trial record.

at A150. It is entirely unclear whether any petitioner can now sustain its burden of proof on the issue of reliance.[8]

C. The Petitioners Likely Waived Their Fraud Claims.

As noted above, the only alleged misrepresentation remaining in this case is New England Re's statement in the placing materials for the 1980 SANS treaties that it planned to obtain business directly from primary insurers. *Compagnie*, 57 F.3d at 81, Pet. App. at A113-114. In the placing materials for the 1981 treaties, however, New England Re explicitly and accurately disclosed that during 1980 all of the reinsurance that it did not obtain directly from First State (a primary insurer) was obtained from Baccala and Shoop Insurance Services, a well-known insurance intermediary. *Compagnie*, 57 F.3d at 83, Pet. App. at A119 ; P. Ex. 4; Tr. 23:119. Upon receipt of this information, none of the thirty-two petitioners complained; none asked that the 1980 treaties be rescinded; none

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[8] Petitioners' RICO claim is deficient in yet another respect. Whether or not the petitioners prove reliance, they will be required to prove a "pattern of racketeering activity." 18 U.S.C. § 1962(a)-(c). There can be no pattern of "related" acts where, as here, there has been only one misrepresentation. *HJ, Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229, 237 (1989)(requiring multiple, related predicate acts). Multiple repetitions to different persons of a single misstatement do not constitute a pattern of racketeering. *Apparel Art, Inc. v. Jacobson*, 967 F.2d 720, 723 (1st Cir. 1992) (Breyer, C.J.) (courts "have consistently held that a single episode does not constitute a 'pattern,' even if that single episode involves behavior that amounts to several crimes (for example, several unlawful mailings)"). Therefore, unless the petitioners affirmatively establish, in the remand proceeding, that New England Re made a second and related misrepresentation, the petitioners will be unable to establish the elements of a RICO violation.

requested a reconfirmation of New England Re's original representation; none asked that a provision be added to the 1981 treaties requiring New England Re to obtain reinsurance business directly from primary insurers; and all agreed to participate in the 1981 treaties. P. Ex. 475; Tr. 22:67-69; 3:127; 25:45.

Citing these facts and others, the First Circuit stated that "if certain plaintiffs [petitioners] renewed their annual participation in the SANS treaties even after becoming aware that defendants [respondents] were using intermediaries and lacked 'direct' business this could affect their right to recover in fraud . . . on some theory of acquiescence or waiver." *Compagnie*, 57 F.3d at 84, Pet. App. at A121. *See also Elias Brothers Restaurants v. Acorn Enterprises*, 831 F. Supp. 920 (D. Mass. 1993). If the District Court concludes that the petitioners waived their only remaining fraud claim, the petitioners' RICO claims will disappear.

For any of the foregoing reasons, the issues presented by the instant petition may be rendered moot by the ongoing proceedings in the courts below. Review by this Court, if any, should await a final decision by the lower courts. Interlocutory review should be denied.

II

THE "CONFLICT" AMONG THE CIRCUITS, WHICH CONSISTS OF A SINGLE EXCEPTION TO AN OVERWHELMING MAJORITY RULE, DOES NOT WARRANT REVIEW BY THIS COURT.

It is undisputed that the First Circuit's interpretation of 18 U.S.C. § 1962(a) is entirely consistent with decisions of the Second, Third, Fifth, Sixth, Ninth, Tenth and District

of Columbia Circuits on precisely the same issue.[9] Similarly, petitioners concede that the First Circuit's interpretation of 18 U.S.C. § 1962(b) is consistent with decisions in the Third, Fifth and District of Columbia Circuits (and numerous district court decisions in other circuits).[10]

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[9] These courts have held that Sections 1962(a) and 1964(c) require proof of investment injury. *Nugget Hydroelectric v. Pacific Gas and Elec.*, 981 F.2d 429, 437 (9th Cir.), *cert. denied*, 113 S.Ct. 2336 (1993); *Ouaknine v. MacFarlane*, 897 F.2d 75, 82-83 (2d Cir. 1990); *Rose v. Bartle*, 871 F.2d 331, 357-58 (3rd Cir. 1989); *Parker & Parsley Petroleum v. Dresser Indus.*, 972 F.2d 580-84 (5th Cir. 1992); *Craighead v. E.F. Hutton & Co.*, 899 F.2d 485, 494 (6th Cir. 1990); *Grider v. Texas Oil & Gas Corp.*, 868 F.2d 1147, 1149-51 (10th Cir.), *cert denied*, 493 U.S. 820 (1989); *Danielsen v. Burnside-OTT Aviation Training Ctr.*, 941 F.2d 1220, 1229-30 (D.C. Cir. 1991).

[10] *Lightning Lube, Inc. v. Witco Corp.*, 4 F.3d 1153, 1190-91 (3rd Cir. 1993); *Danielsen*, 941 F.2d at 1230-31 (D.C. Cir.); *Old Time Ent. v. Intern. Coffee Corp.*, 862 F.2d 1213, 1219 (5th Cir. 1989); *U.S. Concord, Inc. v. Harris Graphics Corp.*, 757 F. Supp. 1053, 1060 (N.D. Cal. 1991); *Midwest Grinding Co. v. Spitz*, 716 F. Supp. 1087, 1090-91(N.D. Ill. 1989); *S&M Exteriors, Inc. v. Amerimark Building Products, Inc.*, 1992 RICO Business Disputes Guide ¶ 7941 (N.D. Ill. 1991); *Physicians Weight Loss Centers of America v. Creighton*, 1992 RICO Business Disputes Guide ¶ 8000 (E.D. Ohio 1992); *John and Jane Does 1-85 v. Republic Health Corp.*, 8 RICO Law Rptr. 828 (D. Nev. 1988); *Heaney v. Associated Bank, N.A.*, 1990 U.S. Dist. LEXIS 17317 49-50 (E.D. Wis. 1990); *Ohio Reinsurance Co. v. Bengston*, CV 86-6243/6244 (C.D. Cal. 1993), reported in Mealey's Litig. Repts. (Reinsurance), Vol. 3, No. 23 (April 14, 1993).

The petitioners rely on a single Fourth Circuit decision under Section 1962(a).[11] Six of the eight decisions that constitute the Section 1962(a) majority rule, and three of the four decisions that constitute the Section 1962(b) unanimous rule, were rendered after the Fourth Circuit decision. There is, as a result, a growing, and now well developed, consensus among the courts of appeals with respect to the issues presented by the instant petition. The decision below merely joins that consensus. There is not the kind of "real and embarrassing conflict of opinion and authority between the circuit courts," which is requisite to review on certiorari. *Labor Board v. Pittsburgh S.S. Co.*, 340 U.S. 498, 502 (1951) (quoting *Layne & Co. v. Western Well Works*, 261 U.S. 387, 393 (1923)).

This Court has recently denied review of the precise issues advanced by the petitioners. *Nugget Hydroelectric v. Pacific Gas and Elec.*, 981 F.2d 429, 437 (9th Cir.), *cert denied*, 113 S.Ct. 2336 (1993). *See also Grider v. Texas Oil & Gas Corp.*, 868 F.2d 1147 (10th Cir.), *cert. denied*, 493 U.S. 820 (1989). There is even less reason to grant review of these issues now. Since this Court denied the petition in *Nugget*, all three of the courts of appeals to consider these issues have reaffirmed their commitment to the majority rule. *Crowe v. Henry*, 43 F.3d 198, 205 (5th Cir. 1995); *Vemco, Inc. v. Camardella*, 23 F.3d 129, 132-133 (6th Cir. 1994); *Confederate Memorial Ass'n v. Hines*, 995 F.2d 295, 298-299 (D.C. Cir. 1993).

The courts of appeals themselves are well along in the process of resolving the extremely limited conflict

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[11] *Busby v. Crown Supply, Inc.*, 896 F.2d 833 (4th Cir. 1990).

presented by the instant petition.[12] This case does not warrant review by this Court.

III

THE FIRST CIRCUIT'S RULING, AND THE RULINGS OF SEVEN OTHER FEDERAL COURTS OF APPEALS, ARE CORRECT.

The decisions of the First Circuit, and of the other federal courts of appeals that constitute the vast majority rule, are correct. These decisions require proof of what the courts of appeals refer to as "investment injury" and "acquisition injury." This result is compelled by the plain language of §§ 1962(a) and (b). *See Reves v. Ernst & Young*, 113 S. Ct. 1163, 1169 (1993)("In determining the scope of a statute, we look first to its language. If the statutory language is unambiguous, in the absence of 'a clearly expressed legislative intent to the contrary, that language must ordinarily be regarded as conclusive.'") (internal citation omitted).

18 U.S.C. § 1962(a) states, in pertinent part:

> It shall be unlawful for any person who has received any income derived . . . from a pattern of racketeering activity . . . *to use or invest*, directly or indirectly, any part of such

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[12] The Fourth Circuit has demonstrated its willingness to reverse a prior RICO ruling when it found that ruling to be contrary to weight of later appellate decisions. In *Busby*, the Fourth Circuit decision relied upon in the petition, the court reversed its own prior aberrant ruling requiring that a RICO "person" be distinct from an "enterprise" for purposes of Section 1962(a). *See Busby*, 896 F.2d at 841 and n. 9; *compare United States v. Computer Sciences Corp.*, 689 F.2d 1181 (4th Cir. 1982).

> income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise.

(emphasis supplied). 18 U.S.C. § 1964(c) extends a private right of action to any person injured "*by reason of* a violation of section 1962." (emphasis supplied).

By its plain and unambiguous terms, Section 1962(a) constitutes a prohibition against the investment of the proceeds of racketeering activity. It is not a prohibition upon racketeering activity *per se*. *Grider*, 868 F.2d at 1149 (Section 1962(a) "does not state that it is unlawful to receive racketeering income . . . [rather] the statute prohibits a person *who has received* such income *from using or investing it* in the proscribed manner") (emphasis in original); *Ouaknine*, 897 F.2d at 82 ("mere participation in predicate acts of racketeering" is insufficient).

The federal courts of appeals, with a single exception, have consistently read Sections 1962(a) and 1964(c) to require proof of (1) a use or investment, (2) of racketeering income, and (3) an injury to the plaintiff resulting from -- "by reason of" -- that use or investment (*i.e.*, an "investment injury"). The Ninth Circuit concisely summarized the reasoning underlying these requirements:

> In determining the elements of a RICO claim, we first examine the language of the statute . . . . The plain language of these two provisions [§§ 1964(c) and 1962(a)] leads us to conclude that a plaintiff seeking civil damages for a violation of section 1962(a) must allege facts tending to show that he or she was injured by the use or investment of racketeering income.

Nugget, 981 F.2d at 437. *See also Lightning Lube, Inc. v. Witco Corp.*, 4 F.3d 1153, 1188 (3rd Cir. 1993) ("the plaintiff must allege an injury resulting from the investment of racketeering income distinct from an injury caused by the predicate acts themselves . . . because Section 1962(a) . . . 'requires that a plaintiff's injury be *caused by the use or investment of income* in the enterprise'") (emphasis in original) (citations omitted).[13]

For similar reasons, the court of appeals decisions under 18 U.S.C. § 1962(b) require proof of an "acquisition injury." Section 1962(b) states:

> It shall be unlawful for any person through a pattern of racketeering activity . . . *to acquire or maintain* any interest in or control of any enterprise.

Read together with Section 1964(c) (which requires proof of an injury "by reason of" a violation of Section 1962), this provision required the petitioners to prove (1) the acquisition or maintenance, (2) of control of an enterprise, (3) through a pattern of racketeering activity and (4) that the plaintiff suffered an injury caused by a prohibited acquisition or maintenance of control.

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[13] RICO's "liberal construction clause," which is at the heart of petitioners' claim for review, does not operate as an instruction to disregard the plain words of the statute. This Court has stated that the clause "is not an invitation to apply RICO to new purposes that Congress never intended . . . . The clause 'only serves as an aid for resolving an ambiguity; it is not to be used to beget one.'" *Reves*, 113 S.Ct. at 1172 (*quoting Sedima*, 473 U.S. at 492, n. 10). *See also Ouaknine*, 897 F.2d at 83 ("that general principle does not permit abrogation of the explicit words of the statute which here limit recovery under § 1962(a) to injury by reason of investment").

As the District of Columbia Circuit said in *Danielsen*:

> [Section 1962(b)] makes it unlawful to acquire control of an enterprise through a pattern of racketeering activity. Therefore, given the language of § 1964(c) set forth above, plaintiffs must allege an "acquisition" injury, analogous to the "use or investment injury" required under § 1962(a) to show injury by reason of a § 1962(b) violation.
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> * * *
>
> Section 1962(b) requires proof of injury arising from the acquisition or maintenance of an interest in or control of an enterprise.

941 F.2d at 1231.

The petitioners did not prove either an investment injury or an acquisition injury. They alleged only that they were induced by New England Re's misrepresentation to enter the SANS treaties, that the misrepresentation constituted mail and wire fraud, and that they lost money on the SANS treaties. *See* Petition at 21. The petitioners' argument that they are entitled to recover for injuries caused by mail and wire fraud alone, is inconsistent with the words of the statute. Petitioners' proposed interpretation would permit a plaintiff to recover damages without proof either of a prohibited investment or acquisition, or of any injury resulting from such an investment or acquisition. Their interpretation would render most of the language of Sections 1962(a) and (b) surplusage, and would read out of Section 1964(c) the requirement that a plaintiff recover only for injuries which occurred "by reason of" the conduct that constitutes the violation of Sections 1962(a) and (b). Further, petitioners' theory would allow recovery under

each subsection of 18 U.S.C. § 1962 (including Section 1962(c))[14] for injuries resulting from exactly the same conduct -- the commission of predicate acts -- even though each subsection is manifestly designed to prohibit a different type of conduct. That interpretation is simply wrong. *Kehr Packages, Inc. v. Fidelcor, Inc.*, 926 F.2d 1406, 1411 (3rd Cir. 1991) ("Section 1962 contains four separate subsections, each addressing a different problem"); *see also Danielsen*, 941 F.2d at 1230 ("if allegations sufficient to base a § 1962(a) action meet all the requirements of a § 1962(c) allegation, then why did Congress pass both?").

The decisions of the eight federal circuits acknowledging the investment injury requirement and the four circuits articulating the acquisition injury rule, were all rendered *after*, and are consistent with, this Court's decision in *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479 (1985). *See* Petition at 18-20. *Sedima* states that a "plaintiff only has standing if . . . he has been injured . . . by the *conduct constituting the violation* [of Section 1962]." *Id.* at 496 (emphasis supplied). Petitioners did not allege, and could not prove, that they were injured by the conduct that is prohibited by Sections 1962(a) and (b).

Sedima arose under Section 1962(c), not Sections 1962(a) and (b). The meaning and applicability of Section 1962(c) is not at issue on the present petition. This Court

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[14] 18 U.S.C. § 1962(c) makes it "unlawful for any person employed by or associated with any enterprise . . . to conduct or participate . . . in the conduct of such enterprise's affairs through a pattern of racketeering activity." The petitioners' Section 1962(c) claim was rejected by the Court of Appeals and is not the subject of the instant petition. *Compagnie*, 57 F.3d at 92, 94, Pet. App. at A144-145, 151.

said in *Sedima* that "[t]he essence of the violation" of Section 1962(c) is the "commission of [the predicate] acts in connection with the conduct of an enterprise." *Id.* at 497. By contrast, the gravamen of a violation of Section 1962(a) is the *investment* of income derived from racketeering, and the essence of a Section 1962(b) violation is the *acquisition or maintenance* of control of a business as a result of racketeering activity. The post-*Sedima* court of appeals decisions distinguish *Sedima* on this precise ground. *Ouaknine*, 897 F.2d at 83; *Grider*, 868 F.2d at 1150. And, this Court has twice denied certiorari petitions seeking review of post-*Sedima* decisions which articulate the investment injury or acquisition injury rules. *See* p. 16, *supra*.

CONCLUSION

Because the First Circuit's decision is interlocutory in nature, the instant petition presents questions which are not appropriate for review at this time. Moreover, the First Circuit's decision is correct, and is consistent with the decisions of this Court and of seven other federal courts of appeals. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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